PHILOSOPHY OF LAW

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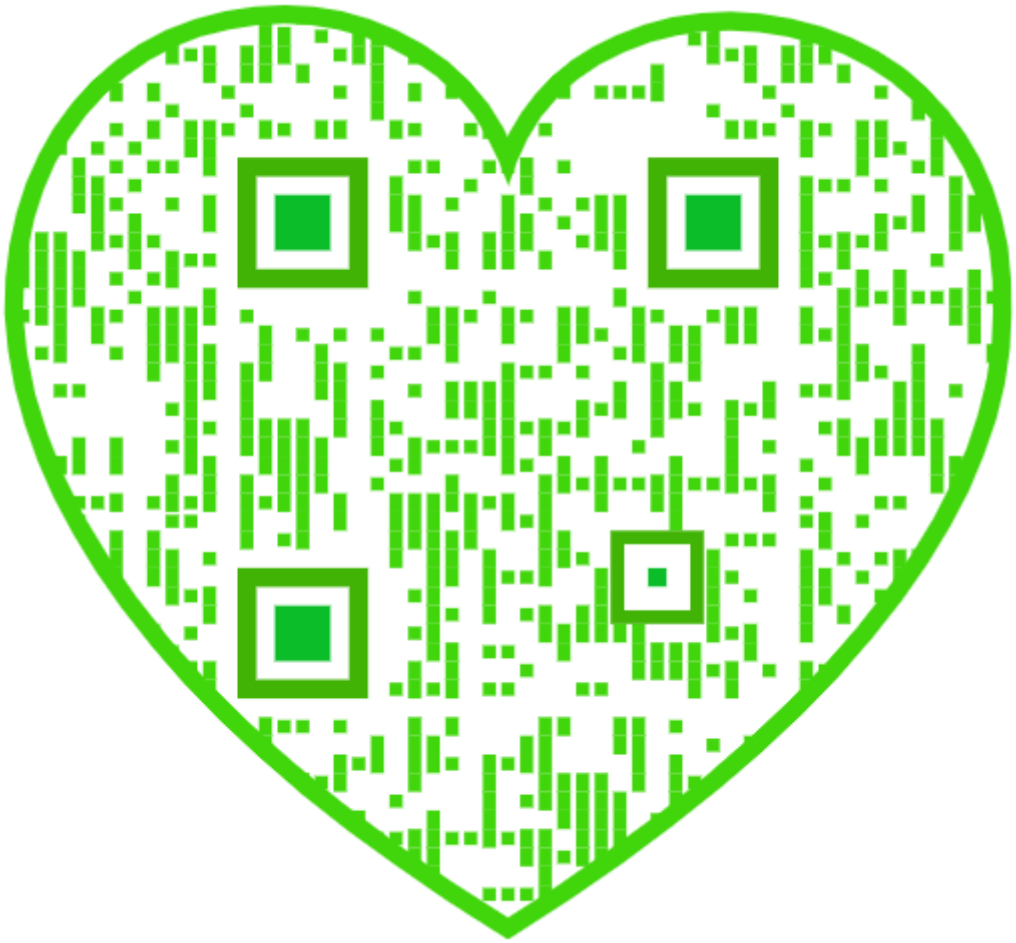

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GENERAL INTRODUCTION TO THE SERIES

By the Editorial Committee

"Until either philosophers become kings," said Socrates, "or kings philosophers, States will never succeed in remedying their shortcomings." And if he was loath to give forth this view, because, as he admitted, it might "sink him beneath the waters of laughter and ridicule," so to-day among us it would doubtless resound in folly if we sought to apply it again in our own field of State life, and to assert that philosophers must become lawyers or lawyers philosophers, if our law is ever to be advanced into its perfect working.

And yet there is hope, as there is need, among us to-day, of some such transformation. Of course, history shows that there always have been cycles of legal progress, and that they have often been heralded and guided by philosophies. But particularly there is hope that our own people may be the generation now about to exemplify this.

There are several reasons for thinking our people apt thereto. But, without delaying over the grounds for such speculations, let us recall that as shrewd and good-natured an observer as DeTocqueville saw this in us. He admits that "in most of the operations of the mind, each American appeals to the individual exercise of his own understanding alone; therefore in no country in the civilized world is less attention paid to philosophy than in the United States." But, he adds, "the Americans are much more addicted to the use of general ideas than the English, and entertain a much

greater relish for them." And since philosophy is, after all, only the science of general ideas — analyzing, restating, and reconstructing concrete experience — we may well trust that (if ever we do go at it with a will) we shall discover in ourselves a taste and high capacity for it, and shall direct our powers as fruitfully upon law as we have done upon other fields.

Hitherto, to be sure, our own outlook on juristic learning has been insular. The value of the study of comparative law has only in recent years come to be recognized by us. Our juristic methods are still primitive, in that we seek to know only by our own experience, and pay no heed to the experience of others. Our historic bond with English law alone, and our consequent lack of recognition of the universal character of law as a generic institution, have prevented any wide contact with foreign literatures. While heedless of external help in the practical matter of legislation, we have been oblivious to the abstract nature of law. Philosophy of law has been to us almost a meaningless and alien phrase. "All philosophers are reducible in the end to two classes only: utilitarians and futilitarians," is the cynical epigram of a great wit of modern fiction.[1] And no doubt the philistines of our profession would echo this sarcasm.

And yet no country and no age have ever been free (whether conscious of the fact or not) from some drift of philosophic thought. "In each epoch of time," says M. Leroy, in a brilliant book of recent years, "there is current a certain type of philosophic doctrine — a philosophy deep-seated in each one of us, and observable clearly and consciously in the utterances of the day — alike in novels, newspapers, and speeches, and equally

[1] M. Dumaresq, in Mr. Paterson's "The Old Dance Master."

in town and country, workshop and counting-house." Without some fundamental basis of action, or theory of ends, all legislation and judicial interpretation are reduced to an anarchy of uncertainty. It is like mathematics without fundamental definitions and axioms. Amidst such conditions, no legal demonstration can be fixed, even for a moment. Social institutions, instead of being governed by the guidance of an intelligent free will, are thrown back to the blind determinism of the forces manifested in the natural sciences. Even the phenomenon of experimental legislation, which is peculiar to Anglo-American countries, cannot successfully ignore the necessity of having social ends.

The time is ripe for action in this field. To quote the statement of reasons given in the memorial presented at the annual meeting of the Association of American Law Schools in August, 1910: —

> The need of the series now proposed is so obvious as hardly to need advocacy. We are on the threshold of a long period of constructive readjustment and restatement of our law in almost every department. We come to the task, as a profession, almost wholly untrained in the technic of legal analysis and legal science in general. Neither we, nor any community, could expect anything but crude results without thorough preparation. Many teachers, and scores of students and practitioners, must first have become thoroughly familiar with the world's methods of juristic thought. As a first preparation for the coming years of that kind of activity, it is the part of wisdom first to familiarize ourselves with what has been done by the great modern thinkers abroad — to catch up with the general state of learning on the subject. After a season of this, we shall breed a family of well-equipped and original thinkers of our own. Our own law must, of course, be worked out ultimately by our own thinkers; but they must first be equipped with the state of learning in the world to date.
>
> How far from "unpractical" this field of thought and research really is has been illustrated very recently in the Federal Supreme Court, where the opposing opinions in a great case (*Kuhn* v. *Fair-*

mont Coal Co.) turned upon the respective conceptions of "law" in the abstract, and where Professor Gray's recent work on "The Nature and Sources of the Law" was quoted, and supplied direct material for judicial decision.

Acting upon this memorial, the following resolution was passed at that meeting: —

That a committee of five be appointed by the president, to arrange for the translation and publication of a series of continental masterworks on jurisprudence and philosophy of law.

The committee spent a year in collecting the material. Advice was sought from a score of masters in the leading universities of France, Germany, Italy, Spain, and elsewhere. The present series is the result of these labors.

In the selection of this series, the committee's purpose has been, not so much to cover the whole field of modern philosophy of law, as to exhibit faithfully and fairly all the modern viewpoints of any present importance. The older foundation-works of two generations ago are, with some exceptions, already accessible in English translation. But they have been long supplanted by the products of newer schools of thought which are offered in this series in their latest and most representative form. It is believed that the complete series will represent in compact form a collection of materials whose equal cannot be found at this time in any single foreign literature.

The committee has not sought to offer the final solution of any philosophical or juristic problems; nor to follow any preference for any particular theory or school of thought. Its chief purpose has been to present to English readers the most representative views of the most modern writers in jurisprudence and philosophy of law. The series shows a wide geographical representation; but the selection has not been centered on the

notion of giving equal recognition to all countries. Primarily, the desire has been to represent the various schools of thought; and, consistently with this, then to represent the different chief countries. This aim, however, has involved little difficulty; for Continental thought has lines of cleavage which make it easy to represent the leading schools and the leading nations at the same time. Germany, for example, is represented in modern thought by a preponderant metaphysical influence. Italy is primarily positivist, with subordinate German and English influences. France in its modern standpoint is largely sociological, while making an effort to assimilate English ideas and customs in its theories of legislation and the administration of justice. Spain, Austria, Switzerland, Hungary, are represented in the Introductions and the shorter essays; but no country other than Germany, Italy, and France is typical of any important theory requiring additions to the scope of the series.

To offer here an historical introduction, surveying the various schools of thought and the progress from past to present, was regarded by the committee as unnecessary. The volumes of Dr. Berolzheimer and Professor Miraglia amply serve this purpose; and the introductory chapter of the latter volume provides a short summary of the history of general philosophy, rapidly placing the reader in touch with the various schools and their standpoints. The series has been so arranged (in the numbered list fronting the title page) as to indicate that order of perusal which will be most suitable for those who desire to master the field progressively and fruitfully.

The committee takes great pleasure in acknowledging the important part rendered in the consummation of this project, by the publisher, the authors, and the translators. Without them this series manifestly would have been impossible.

To the publisher we are grateful for the hearty sponsorship of a kind of literature which is so important to the advancement of American legal science. And here the Committee desires also to express its indebtedness to Elbert H. Gary, Esq., of New York City, for his ample provision of materials for legal science in the Gary Library of Continental Law (in Northwestern University). In the researches of preparation for this Series, those materials were found indispensable.

The authors (or their representatives) have cordially granted the right of English translation, and have shown a friendly interest in promoting our aims. The committee would be assuming too much to thank these learned writers on its own behalf, since the debt is one that we all owe.

The severe labor of this undertaking fell upon the translators. It required not only a none too common linguistic skill, but also a wide range of varied learning in fields little travelled. Whatever success may attend and whatever good may follow will in a peculiar way be attributable to the scholarly labors of the several translators.

The committee finds special satisfaction in having been able to assemble in a common purpose such an array of talent and learning; and it will feel that its own small contribution to this unified effort has been amply recompensed if this series will measurably help to improve and to refine our institutions for the administration of justice.

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EDITORIAL PREFACE

By Albert Kocourek [1]

To attain the highest rank in a learned profession is a great achievement in any age; but for a writer to be accorded indisputable juristic leadership while yet in the midst of his activities, and in a period of the world's history unlike any other in its specialism of knowledge and its competitive struggle for learning, is a highly noteworthy distinction. One of our most competent investigators, himself an authority in jurisprudence, and holding entirely contrary fundamental notions as to the metaphysical basis of law, says, speaking of the neo-Hegelians: "The leader of this school, Josef Kohler, without question the first of living jurists, is remarkable for the breadth as well as for the depth of his legal scholarship. A pioneer in comparative legal history, he has made himself an authority not merely upon the general subject, but upon more than one special branch, and upon the legal history of more than one primitive people. At the same time, he has made himself an authority upon such specialized subjects of dogmatic law as the law of bankruptcy and patent law, has made important contributions to modern criminalistic, has written a text-book of the German Civil Code, and has taken the lead in the most active and most widely accepted movement in the modern Philosophy of Law. No one else has come so near to taking all legal knowledge

[1] Lecturer on Jurisprudence in Northwestern University, and member of the Editorial Committee for this Series.

for his province. No one, therefore, is so well prepared to reduce all legal knowledge to a system."[1]

Whether, in the present case, the remarks of Solon on happiness, in Plutarch's narrative, have any application to the matter of fame, may be waived; and we may readily accept these generous conclusions issuing out of a hostile camp of legal philosophy.

Yet, something more should be said regarding the amazing extent and variety of Kohler's intellectual creation. On the twenty-fifth anniversary of his professorial labors, the "Juristisches Literaturblatt" (Berlin) in a special supplement,[2] published an index of his writings which at that time numbered 526 separate titles. A complete statement of Kohler's works within his lifetime would be a matter of some practical difficulty; since new announcements are constantly appearing showing his restless activity in this or that department of law, in philosophy, in general literature, or in the fine arts. Before a list could be made up and put into printer's type, it would be incomplete; and such an effort would therefore exactly parallel the Eleatic problem of Achilles and the tortoise. Kohler's extraordinary creative fertility calls to mind a countryman born just a hundred years earlier — Goethe. There was a collection of Goethe's works, published in his lifetime, which numbered forty volumes, and which was increased by posthumous writings by twenty additional volumes. The works of lawyers are not usually collected, as in other fields of literature; and the present writer does not know the extent of Kohler's works, measured by the Goethe standard of bulk; but it is unquestionable that the total at this moment would exhibit a remarkable

[1] *Roscoe Pound*, "The Scope and Purpose of Sociological Jurisprudence" (reprinted from *The Harvard Law Review*, Vol. XXIV, No. 8, and Vol. XXV, Nos. 2 and 6; Cambridge, 1912), p. 155, *seq.*

[2] Bd. XV, 30 September, 1903.

showing of industry, to pass by entirely the quality of the labor.

As Goethe was nearly everything in letters, and many things besides — lawyer, art critic, theatre director, statesman, scientist; so Kohler has written authoritatively in many departments of the law, and been active in many other ways, — as philosopher, poet, musician, art critic, ethnologist, criminologist, teacher; with all the inspiration of the former, and without his human frailties.

What has been said of the extent of Kohler's writing can give no adequate notion of its astounding range. When a writer's contributions are accepted in journals of standing and authority, he naturally is also credited with authority; but when such a writer is able to make himself heard in a half-dozen different circles of learning he is regarded as one possessed of unusual talents. But what shall be said of a man who seems to have made an impression on a score or scores of fields of specialized effort? Closer inspection of the list above referred to, which, since its date, has doubtless been augmented by hundreds of titles, shows, to mention only general subjects, Kohler's interest in such matters as Philosophy of Law, General Jurisprudence, History of Civil Law, Obligations, the Law of Things, the Law of Personality, the Law of Immaterial Things, Family Law, Succession, Commercial Law, Maritime Law, the Law of Insurance, Civil Procedure, Bankruptcy, Criminal Law, Criminal Procedure, Public and Administrative Law, Comparative Law, Legal Ethnology, History, Folk-lore, Æsthetics, Music Criticism and Composition, Biography, Humor, and Poetry.

The detail is even more surprising. Thus, we find such decided contrasts as a book on patent law of nearly a thousand pages, against which we may oppose,

at random, something from another world, his opus 8, a composition for the voice with a piano accompaniment; or, again, a volume of studies on the Law of Pledge, against an essay on the Veronese school of painting; and so on to a length to make one marvel if after all Kohler is not, like Homer, something of a myth, an illusion of literature personified; or perhaps, if his historicity cannot be disputed, whether it may not be said of him, as has been said of other men who have been prolific or versatile in creation, that these many titles are the work of many minds, and that Kohler has been after the fashion of the elder Dumas, only the directing and responsible patron.

Among the important works[8] of Kohler up to the year 1903 are the following:

GENERAL JURISPRUDENCE

(3) "Die Ideale im Recht" (Berlin, 1891, pp. 105; also translated into Polish).

(12) "Einführung in die Rechtswissenschaft" (Leipzig, 1902, pp. 208; now in the 4th ed.; also translated into Russian).

CIVIL LAW

(20) "Rechtsfälle zum Studium des französischen Zivilrechts" (Mannheim, 1877–8, pp. 112).

(21) "Gesammelte Abhandlungen aus dem gemeinen und französischen Zivilrecht" (Mannheim, 1883, pp. 490).

(23) "Zwölf Studien zum B.G.B." (Berlin, 1900, pp. 379).

(24) "Bürgerliches Recht" (in Holtzendorff-Kohler's "Encyclopädie der Rechtswissenschaft," 6th ed., Leipzig, 1903, pp. 95).

(25) "Lehrbuch des Bürgerlichen Rechts nach dem Bürgerlichen Gesetzbuche" I, (Berlin, 1904); (a second volume has since been published).

(52) "Das römische Recht am Niederrhein" (with Liesegang); (Stuttgart, 1896–98, pp. 307).

[8] Reference is made generally to first editions; and the works noted are from those entered in the index of the "Juristisches Literaturblatt." The original serial numbers are retained and shown in parentheses at the left of each title.

(63) "Zur Lehre von den Pertinenzen" (Ihering's Jahrbücher, N. F. 14 Bd., 1888, pp. 183).
(66) "Über den Willen im Privatrechte" (Ihering's J., 28 Bd., 1889, pp. 120).
(88) "Die Menschenhülfe im Privatrecht" (Ihering's J., 25 Bd., 1887, pp. 140).
(104) "Pfandrechtliche Forschungen" (Jena, 1882, pp. 369).
(107) "Der Dispositionsniessbrauch" (Ihering's J., 24 Bd., 1886, pp. 141).
(114) "Beiträge zum Servitutenrecht" (Archiv für Civ. Praxis, 87 Bd., 1897, pp. 155).
(129) "Die Idee des geistigen Eigentums" (Archiv für C. P., 82 Bd., 1894, pp. 101).
(133) "Industrierechtliche Abhandlungen und Gutachten" (Berlin, 1899, pp. 236).
(134) "Autor- und industrierechtliche Abhandlungen und Gutachten" (Berlin, 1901, pp. 221).
(135) "Das Recht des Markenschutzes" (Würzburg, 1885, pp. 580).
(160) "Das Autorrecht" (Jena, 1880, pp. 352).
(166) "Das literarische und artistische Kunstwerk und sein Autorschutz" (Mannheim, 1892, pp. 205).
(170) "Autorrechtliche Studien" (Archiv C. P., 85 Bd., 1896, pp. 121).
(174) "Deutsches Patentrecht," (Mannheim, 1878, pp. 739).
(177) "Forschungen aus dem Patentrecht" (Mannheim, 1888, pp. 126).
(194) "Handbuch des deutschen Patentrechts" (Mannheim, 1901, pp. 971).
(224) "Zivilprozess- und Konkursrecht" (in Holtzendorff-Kohler Ency. pp. 158).
(246) "Prozessrechtliche Forschungen" (Berlin, 1889, pp. 151).
(250) "Ungehorsam und Vollstreckung im Zivilprozess" (Freiburg i. B., 1894, pp. 160).
(251) "Gesammelte Beiträge zum Zivilprozess" (Berlin, 1894, pp. 604).
(267) "Leitfaden des Deutschen Konkursrechts für Studierende" (Stuttgart, 1893, pp. 220; 2d ed. 1903, pp. 374).

CRIMINAL LAW

(274) "Studien aus dem Strafrecht" I (Mannheim, 1890, pp. 238).
(279) "Die peinliche Gerichtsordnung Kaiser Karls V" (with Scheel); (Halle, 1900, pp. 167).

(281) "Die Bambergische Halsgerichtsordnung" (with Scheel); (Halle, 1902, pp. 312).

COMPARATIVE LAW

(321) "Rechtsphilosophie und Universalrechtsgeschichte" (in Holtzendorff-Kohler, 1903, pp. 1–69).
(356) "Zur Urgeschichte der Ehe" (Stuttgart, 1897, pp. 167).
(368) "Rechtsvergleichende Studien" (Berlin, 1889, pp. 252).
(389) "Des Recht der Azteken" (Stuttgart, 1892, pp. 111).
(403) "Aus dem Babylonischen Rechtsleben" (with Peiser) (Leipzig, 1890–91–94–98, pp. 272).
(408) "Hammurabis Gesetz" (with Peiser-Ungnad, 1904–1909).
(424) "Rechtshistorische und rechtsvergleichende Forschungen" (1882, pp. 100).

ÆSTHETICS

(447) "Aus dem Lande der Kunst" (Würzburg, 1882, pp. 86).
(448) "Ästhetische Streifereien" (Mannheim, 1889, pp. 70).
(454) "Vom Lebenspfad" (collected essays) (Mannheim, 1902, pp. 212).
(470) "Shakespeare vor dem Forum der Jurisprudenz" (Würzburg, 1884, pp. 300).

POETRY

(498) "Lyrische Gedichte und Balladen" (Mannheim, 1892, pp. 362).
(500) "Der Leibestod" (Mannheim, 1893, pp. 112).
(505) "Neue Dichtungen" (Mannheim, 1895, pp. 263).
(509) "Dantes heilige Reise" (3 vols. Köln., 1901–2–3, pp. 224, 234, 222).
(510) "Aus Petrarcas Sonettenschatz" (Berlin, 1902, pp. 115).

Among numerous later works of Kohler there can only be noted here two works in the field of Philosophy of Law—his "Moderne Rechtsprobleme" (1907), and the "Lehrbuch der Rechtsphilosophie" (Berlin, 1909), which is the work now rendered into English.

Kohler's style is affirmative and belligerent. He is never in doubt as to his own position, and does not hesitate to make that position clear. It requires a virile disposition for such capacity as he has exhibited, and

this energy frequently is shown in combating opposition. As an antagonist, Kohler fights with deadly weapons. The late Professor James could only think of an idealistic philosophy as a tender-minded way of thinking; but, surely, he would have found neo-Hegelianism entirely too realistic to square with his characterization.

The elemental savagery of German criticism has probably struck every reader who has looked into Prussian reviews. The summary way in which antagonists are disposed of will, from time to time, be disclosed in the ensuing text, even as the lethal blows are softened by the shock-absorbing devices of the English language in the hands of the translator. The German language is blunt and plain; it does not cut, like the French, with a nice precision, leaving a neatly dissected corpse, but annihilates; and the militant temperament of the imperial capital allows no opposition — not even on the quagmires of metaphysics.

As Kohler is neo-Romantic in art, it would be strange to find him holding to a classical dialectic in Philosophy of Law. This anomaly does not exist, and Kohler belongs to the same school as Berolzheimer, author of "The World's Legal Philosophies" in this series, and Lasson, the genial thinker whose good-natured appreciation appears as a part of this volume. Kohler's philosophical position is not found completely stated in its outlines and implications in this or any other particular contribution; and, perhaps, even if all his writings in this sphere were marshalled and collated, there might still appear to be many vacancies and obscurities to perplex a technically trained philosopher. Especially would there be wanting anything like a self-contained metaphysical system; but it must be remembered that Kohler has never at any time set himself the purpose of writing a substitute for Hegel's "Phenomenology of

Spirit"; and that his system, so far as it is a system, finds its fundamental premises in the Hegelian doctrine with the elimination of all formal elements.

Nothing more significant has ever occurred in the history of Philosophy of Law than that its text-book should be written by a man who possesses not only wide and deep knowledge of philosophical speculation, but who combines metaphysical learning with remarkable mastery of the law in its historical and positive aspects. The great names in Philosophy of Law heretofore have represented many kinds of scholarship except legal scholarship; and much of the distrust which has prevailed to make the way of this study difficult is undoubtedly explainable on this ground: for what has a jurist to learn about the law from a philosopher?

Whether this work successfully builds up its thesis for the reality of a metaphysic of the law is a question upon which much can and probably will be said; but that as a unified elaboration of the entire material of legal history, it will make conspicuous the principle of the relativity of the law, and the wonderful teleology of evolution, will be made manifest to any unprejudiced reader whatever his other conclusions. It cannot be expected, however, that the forces of legal nihilism — those who deny everything but the coarsest interpretation of the conflicts of social life — will capitulate as an army, to the idealistic groundwork of a system which must admit brutality, egoism, and evil. The perspective of life is too extensive, and the forces of historical change are too subtle to be apprehended by those who see only the struggle for the demands of a barren material existence.

It will not be necessary here to attempt a critical examination of Kohler's position in Philosophy of Law in view of the able discussion of this matter elsewhere in this volume. Attention should, however, be called to

Berolzheimer's "The World's Legal Philosophies" (Mrs. Jastrow's translation, Vol. II of this series, particularly pp. 422–427). It only remains to enumerate some additional facts to complete this biographical note.

Josef Kohler was born March 9, 1849, at Offenburg, Germany. He received his education at the gymnasia of Offenburg and Rastatt, and the universities of Freiburg and Heidelberg. He became "Amtsrichter" at Mannheim in 1874; later "Assessor" and "Rat" of the District Court at Mannheim. In 1878 he became professor of law at Würzburg; and in 1888 professor of law at the University of Berlin, which latter appointment he still holds.

Everything that Kohler has attempted is characterized by breadth of interest and intensity of production. This is shown not only in his own writings, but equally in co-operative labors in which he has vastly stimulated learned efforts of others. What Kohler has done in the direction of influencing others would more than suffice to mark him as a great dynamic personality. We may instance, as examples of this, the following propulsive undertakings: in 1888 he became editor (jointly with Viktor Ring) of "Archiv für bürgerliches Recht"; in 1903 he became editor of "Berliner Juristischen Beträge"; for many years he has had editorial management of that great repository of historical information, "Zeitschrift für Vergleichende Rechtswissenschaft"; he is founder of "Zeitschrift für Völkerrecht" (now in the 7th voume); publisher (jointly with Berolzheimer) of "Archiv für Rechts- und Wirtschaftsphilosophie," the leading journal of Philosophy of Law (now in the 7th volume); and publisher of "Archiv für Strafrecht und Strafprozess." That these are probably not merely honorary positions may be quickly ascertained on looking into these publications; thus, one finds, to take for

example, the last journal, not only that Kohler is a constant contributor of original articles dealing with the most technical aspects of criminal law, but that apparently, as to that journal, he finds time somehow to read the great number of publications representing every language which come into the editorial office for review: In a recent number of that journal, it appears that a dozen different book reviews at one time do not exceed his capacity. It is true that these reviews are very much condensed; but that does not explain away the fact of Kohler's breadth of reading. It indicates only that he has surveyed the law so widely and so thoroughly, that he is able to hit upon the central thought of a work under consideration with a quick intelligence, and an authoritative estimate of its scientific value.

External matters such as titles, and connections with learned societies, we here set down last and of least importance, in dealing with an author to whose merit little if anything can be added from without. Kohler is a Privy Councillor of Justice; honorary president of the International Association of Legal and Economic Philosophy; member of the Royal Institute "voor de Taal-Land- en Volkenkunde van Nederlandsch Indië"; member of "Société Académique Indo-Chinoise" of Paris; member of "Société de Legislation Comparée" of Paris; member of the "Genootschap van Kunsten en Wetenschappen" of Batavia; member of the "Academy of Sciences of the Institute of Bologna"; honorary member of "Instituto di Storia del Diritto Romano" of the University of Catania; honorary member of the "Greek Philological Society" at Constantinople; member of "Gesellschaft für Rheinische Geschichtskunde" at Köln; and member of the "Societies of Arts and Sciences" at Utrecht. The University of Chicago, a number of years ago, in recognition of Kohler's juristic labors, conferred on him the degree of LL.D.

INTRODUCTION TO THE TRANSLATED VOLUME

By Orrin N. Carter[1]

The tendency is growing in recent years to question the soundness of every branch of substantive and adjective law. Whether this tendency will be beneficial or otherwise will depend largely upon the action of the leaders in the legal profession. Doubtless the teachers and writers upon law will have great influence. It is especially fortunate at this time that through this series the great works upon modern legal philosophy are being made easily accessible to all interested in the subject.

No writer of the last century has written more extensively than the author of this book. It may well be doubted whether any writer in modern times has had as wide a knowledge or as sure a grasp of the subject here considered. He possesses not only remarkable learning but extraordinary intellectual powers which peculiarly fit him for a work of this character. No attempt will be made to refer to his other legal works or to his teaching and writings in other departments of literature, that having been so fully and ably covered in the editorial preface. Perhaps this introduction will be as helpful, not only to the casual reader but to the student of this subject, if the writer briefly calls attention to what he considers some of the most striking thoughts of the work.

"The philosophy of law," Kohler says, "is a branch of philosophy, of that philosophy which deals with man and his culture."[2] "The essence of culture" he states

[1] Justice of the Supreme Court of the State of Illinois.
[2] Note 4, Appendix, 329.

"in the sense of Philosophy of Law, is the greatest possible development of human knowledge, and the greatest possible development of human control over nature." In another work he gives this definition: "Culture is the development of the powers residing in man to a form expressing the destiny of man." [3] In this book he states "The totality of humanity's achievements is called culture; and in this culture, it is the part of the law to promote and to vitalize." He uses the word "culture" in the German sense. In that sense "Culture is the control of nature by science and art." [4] The law is not only the end but the means of this culture. The great German philosopher, Hegel, is his model. The *reason* of Hegel is converted by Kohler in his treatment of the law into *culture*. I am disposed to agree with one of his reviewers that his "theory of law is more fully developed than his philosophical system." [5] Evolution, with him, is the controlling factor in the law. Hence there is no such thing as eternal law. The law which is suitable for one period is not so for another. He urges that we should strive to provide every culture with its corresponding system of law, because there is no fixed permanent law, suitable to all times. He strongly combats the idea of natural law. With him all law is positive, which manifests itself in every people and in every age. His dominant thought is evolution and culture, or as another has said "cultural progression." However much anyone may disagree with his proposition that there is no such thing as natural justice or law, — the same in all centuries and with every people, — one cannot but feel the force of his argument that history shows that law is influenced largely not only by the

[3] "Moderne Rechtsprobleme," Sec. 1.
[4] *Small*, "General Sociology," p. 58.
[5] Appendix, 347.

thought or spirit of the age — what Kohler calls "psychic life" but also by external circumstances; that its character in a country where people live on the plains may be different in many particulars from what it is among people who live in the mountains or near the sea; that a country fitted for commerce needs, and necessarily has, laws differing materially from one that is purely agricultural.

A citizen of America will find it difficult to accept Kohler's teachings that at certain stages of human culture, human slavery is just. He argues that slavery is not evidence that progress is lacking, but rather shows considerable economic progress; that in periods in which there is no progress no need of slaves is felt; that slavery is a means of obtaining a division of labor on a large scale. He holds that no one who looks at the matter entirely from the standpoint of human rights will be able to understand the historical development of slavery, for, he says "Human rights are not advantageous to every development." The reading of his discussion on this subject will cause some of us to wonder less that the institution of slavery was so strongly advocated in portions of our country before the civil war. In connection with his views on slavery it is appropriate to state that his juridical ideal is what some of his critics have designated "as an Hegelian aristocracy;" that law must be permanently ideal and educative, but cannot draw its inspiration from the masses.

One of the most satisfactory parts of the book is his discussion as to the purpose of the law to neutralize the consequences of accident or chance. While we cannot remove chance from the world, he insists that we can try to render it less harmful; that it is a foreign element in evolution and we should so far as possible remove it where it tends to injure us. We do this by insurance

agreements of all kinds, thus distributing over society at large the dangers that meet the individual. This doctrine of equalization by the removal of chance he claims is very important in the case where one has injured another by wrong doing. The legal necessity there requires the transferring of the damage from the person who has been injured to the person who has caused the injury. He illustrates this principle in the law of barter when he states that "The backbone of barter is the equalization of value"; that one of the principal means of eliminating chance was the introduction of money, so that each shall have a standard of value in barter and trade. The payment of interest for the use of money or property he classifies also in the philosophy of the law as belonging to the same general principle whereby the law limits the inequalities of chance. "Time" in his evolution "is the stepmother of humanity." It suppresses values that deserve full recognition. He insists that nations that discount the future are optimistic, filled with the joy of production; that chance is an immense factor in the future; that the oriental nations heretofore by their laws have not guarded against chance and therefore they have prohibited the taking of interest and transactions involving future things. I am disposed to agree largely with most of his conclusions in his wonderfully interesting discussion of the history and philosophy of this branch of the law.

His discussion as to the rights and duties of the individual and society under the head of "Collectivity and Individualization" is well worth reading. He argues that there must be a development of the individual, with the highest possible training of the mental powers, but that humanity can only operate collectively and that there must be a constant alternation between collectivism and individualism in order to make possible the highest

achievements by humanity; that history shows a constant tendency towards individualization and again an increasing pressure towards collectivism. He illustrates these principles by a discussion of the law of inheritance. His argument is that on the one hand the individual demands consideration the same as every other individual, while on the other hand social life often demands that one or more individuals be forced into the background. The conclusion seems to follow from this argument that he would believe in the old English law of primogeniture. He says that the philosophical significance of the right of the individual to make a will lies in the increased importance of the individual as opposed to that of the family. He states in some detail the advantages and disadvantages of allowing a person to deal with his property as he desires, insisting that the interests of society demand that the individual should not be permitted to make contracts that will bind for any great length of time those that come after. If the laws against perpetuities have any philosophical basis, it is found in this argument. In one place he sums up his argument on this question with the statement that "universal history often requires the individual to be thus sacrificed; the iron tread of progress tramples thousands under foot." Might it not be more accurate to say that this occurs in spite, not because of, progress?

Those who are studying the problems as to trusts will find in his discussion on this question much food for thought. While he concedes that the right of contract may be abused in the formation of associations or corporations that control commerce, turning it out of its natural channel, he argues that little can be accomplished by direct coercive measures; that the most efficient means of remedying the evils is to permit the individual to withdraw from the combination at any time, and then

the system will crumble away of itself; that if the attempt is made to perpetuate the system in the form of trusts, individual management being embraced in one great whole, individual interests will again lead to the collapse of such artificial formations. "How impolitic" he exclaims "are all laws that proceed only by prohibitions! We must fight human nature with itself!" He insists, however, that partnerships, associations and corporations should not be permitted to be established for too long a time; that in order to prevent abuses there should be public supervision.

Space will not permit dwelling on his discussion on the rights of personality, the law of things, the law of obligations, family law, gifts, his views on the philosophy of law as to secrecy and publicity in business affairs, his conclusions on the wisdom of the division of governmental powers into executive, legislative, and judicial, or other subjects which are treated by our author most philosophically and with keen analytical power. One or two other topics, however, are of such importance at the present time, that I cannot forego referring briefly to his views thereon.

In these days, when so many are of the opinion that our criminal law and procedure has been outgrown, we will be well repaid by a thoughtful perusal of his views on that subject. He comments on the fact that in recent years it has been believed possible to enforce criminal law in such a manner as to discard all idea of justice; that this theory is supported by an argument that the offender is only a creature of nature, and is compelled to act according to his natural instincts, therefore punishment is absurd, mediaeval and contrary to the spirit of modern times; that the individual is the result of his environment. Our author has no patience with this view of criminal law or criminal justice. He insists

that such a law is "no longer criminal law at all;" that to follow such a line of argument would be to abolish criminal law rather than develop it; that instead of justice we would have merely its empty form. He lays down the principle that the progress of criminal law should be (1) to distinguish and separate sharply, righteous punishment from all the other consequences of the evil deed; (2) to take equal care that the misdeed is expiated by the proper punishment, and with this atonement other corrective measures are employed. Punishment, he says, must conform to humanity's need of punishment.

His treatment of the value of human testimony and the credence to be given to it is most striking. He holds that the means of proof must not be overestimated, and calls attention to the fact that perceptions often produce false impressions; that testimony is the mere raw material out of which the truth must be constructed.

In his discussion as to whether justice is realized under the law his conclusion is that legal procedure as a realization of justice has its disadvantages as well as advantages, the chief disadvantage being the unavoidable delay in obtaining justice, which often is almost equivalent to a denial of it. He recognizes that in modern law there is a strong effort now being made to reconcile the apparently irreconcilable contradiction of the swift realization of justice, with a just decision after a thorough examination of the questions in controversy. He states that among the attempts being made to equalize delay is that of giving the successful party interest on the amount of the judgment from the commencement of the legal proceedings. He insists that the law must be elastic enough to meet the just requirements of the individual case, while avoiding a conflict with the technically logical results under the general rules of law;

that this is not always feasible; that adaptable suppleness must sometimes give way to a certain coarsening, in the interest of greater facility in handling. Consequently the law should be construed, if possible, so that hundreds of disputes can be avoided, and a system of law that inclines in that direction is better than a nicely exact system that constantly involves the people in disputes. A similar line of argument is followed by a great English constitutional writer who asserts that the legal right of every person is conditioned on the welfare of society; that in practical matters there are conflicting rights, that the important feature of any law is the adjustment of such rights, and the best that can frequently be done is to effect a "rough compromise between them." [6]

Kohler is a leader in the modern school of philosophical writers who are attempting to enforce the teachings of Hegel. He is a pioneer in his writings on comparative legal history and philosophy.[7] Even though we may not think his doctrines will survive through future centuries, they will assuredly assist every student of comparative philosophy not only in his studies in the history of the subject, but in reaching correct conclusions as to the objects and purposes of law. Contrary to the deductions of the early Greek philosophers, who considered the ruler more important than the law, Kohler pins his faith on the law rather than the executive, the law-maker or the judge. In this he is in accord with the teachings of our fathers, that ours — as stated in many of our constitutions and court decisions — is a government of laws, not men. He teaches that the standards in the law should be ethical rather than material. He sums up this doctrine in the closing sentence of his preface to

[6] *Dicey*, "Law and Opinion in England", Appendix," 466.
[7] *Roscoe Pound*, 25 Harvard Law Review, p. 155.

this volume: "Materialism is dead; the philosophy of Spirit still lives."

To any student of the law this book is most thought-provoking. It is one of the works from which the reader will be benefited even if he follows Bacon's admonition and only "tastes it" and it also falls within the class of those few "to be chewed and digested." The so-called practical thinkers of today may believe that he deals too much in metaphysics; that his conclusions are based on his theories rather than upon practical experience; that in this regard he can be fairly criticised the same as his great model, Hegel, of whom it is told that coming from his study one day in 1807 just after finishing his most profound work on the philosophy of history, he was much surprised to find French troops on the streets of his own city, Jena; so far forgetting everything else in his study of the science of government that he was not aware that a great battle had been lost by his country, and that its government had been practically destroyed by Napoleon. We are not prepared, however, to agree fully with those who thus criticise. In the long run, the ideal is often the practical. That is a profound philosophy which holds that nothing is ever settled until it is settled right. The great problems in all statesmanship are never settled right until the efforts of the practical man of affairs and the man of ideals are united in one common purpose.

INTRODUCTION TO THE TRANSLATED VOLUME

By William Caldwell[1]

No volume in this series could better realize the desires and purposes of the Editorial Committee of the Association of American Law Schools than this work of Professor Kohler upon the Philosophy of Law. And to no volume in any modern series could a more deserved welcome be given by the friends of ideas, in the larger and the effective sense of this term.

It is typical in the best sense of the spirit of the reconstructive nationalism that is at work in the leading countries of the world to-day, and that is the surest and the sanest step to the internationalism of the future.

The following are the main points of view from which, as the occupant of a more or less representative, official, position, I shall attempt to substantiate the foregoing statements: (1) the distinctive characteristics of Kohler's Philosophy of Law as a book in this Legal Philosophy Series; (2) its chief characteristics from the philosophical point of view; (3) its general modernity in the matter of its spirit, its scholarship, and its affiliations; (4) its peculiar significance and utility to the life and thought, and the general political and social atmosphere, of the United States of America at the present time.

I. Josef Kohler is of course already known to students of the history of the philosophy of the nineteenth century as, along with men like Trendelenburg, Ahrens, Schuppe, Lasson, Ihering, a competent representative

[1] Sc. D. (Edinburgh); Professor of Logic and Moral Philosophy in McGill University, Montreal; author of "The Philosophy of Schopenhauer" (1896), "Pragmatism and Idealism" (1913), etc., etc.

of the spirit and of the traditions of philosophy in the region of the philosophy of jurisprudence. It is also known that his sympathies, so far as a general philosophy of things is concerned, are in the main with the teaching of Hegel, the author of the most comprehensive and pretentious system of Idealism that has perhaps ever been invented by the mind of man. I shall immediately speak of the matter of Kohler's relation to Hegel, and of the relative independence of his thought that warrant us in thinking of him as a Neo-Hegelian, although in a different sense of this term than the one to which we are committed when we speak of Anglo-American Neo-Hegelianism, from the Cairds and Green to Bradley and Royce. The fact however that his thought as a philosopher, and as a great legal thinker, is rooted and grounded in the great principles of Idealism as represented not only by Hegel, but by Plato and Aristotle and others, when taken along with the officially recognized estimates of his services in the field of positive law, is of itself enough to guarantee the wisdom of this Committee in placing the present work before their countrymen, as at least representative of the fundamental thought, and the scholarship, and the expert competence, that must characterize the work of the legal thinkers and teachers of the future in America.

As one, who, although a layman so far as the technicalities of the law are concerned, has at least a working knowledge of Law as a subject to be intimately associated with the studies of the Liberal Arts course in the modern university, I desire to record here that the first thing that impressed me about this work of Kohler's was his obvious, easy, familiarity with the entire range of philosophical speculation about human knowledge and about human practice. And then after this, his consummate ability in thinking out the various divi-

sions and subdivisions, and the various specific topics of law, in the terms not only of "first principles," but of the special considerations of the complex economic and social life of our times.

In comprehensiveness of spirit, therefore, and in methodological exactitude, and in the matter of the mastery of the minutest detail (without which no one can be an expert in anything) this work on the Philosophy of Law has an undoubtedly educative and representative place in the Legal Philosophy Series. And that this is the case will be discovered by any one who will read, without presuppositions, any of its sections upon any particular legal topic, and then some of the more general pages of Kohler upon such a broad topic as the legal Philosophy of the State, or the Philosophy of Law in particular, in the opening pages.

If a citation or two be in order here, by way of allowing this remarkable production to speak of its own spirit and its own determinative point of view, perhaps we may direct the attention of the reader to the following: (1) "Law is the standard of conduct which in consequence of *the inner impulse that urges men toward a reasonable form of life*, emanates from the whole, and is forced upon the individual. It is distinguished from *morals, customs, and religion* as soon as the point is reached at which compulsory standards are separated from the commands that involve social *amenity, etc.*" [Italics mine.] (2) The declaration that "he who is concerned with legislative policy *has already half entered the domain of philosophy.*" And as a single specific instance of the detailed, masterly, and modern treatment of special topics that impresses the student either of logic and methodology, or of matters legal and political, I would name the sections on The Law of Obligations, or the sections on The Law of Federated States.

In either case the reader of to-day will find a consummate and orderly treatment of all the appropriate and incidental topics, and in the former case, say, an illuminative and socially valuable (legal) discussion of such burning questions as the "contracts" that "oppress the economically weak," the "associations" that "control commerce and turn it out of its natural channel," etc., etc.

II. The work shows throughout — in its very inception and aim, in its manner and style, in its general conception of the unity of knowledge and of the purpose of the life of humanity — the influence of Hegel. And it shows this influence, not in the sense of an acceptance of Hegel's mistaken "dialectic" of bare concepts and categories as the last word of human wisdom, but in the sense of an acceptance of Hegel's effort as a whole as the last great expression of a spiritual view of life and reality. To Kohler, too, Hegel is the master worker in the realm of mind, or spirit, or *Sittlichkeit*, the thinker to whom the arrangement and conquest of "material," of difficulties, and prejudices, and complexities, is the peculiar work of science in any form. He is, therefore, on more grounds than one, quite in line with the recent revival (within the last ten years) of interest, in Germany and Italy, in the Hegelian philosophy, after the long reign of Neo-Kantianism and the mere, formal, theory of Knowledge, with the general fresh interest in Germany, in the sciences pertaining to man and man's ideals — reflected, say, in the two recent philosophical journals, *Die Geisteswissenschaften* and *Logos*. "Materialism is dead," proclaims Kohler emphatically in his earlier pages — a declaration which leads him to proclaim the "culture" of the human spirit, the greatest perfection of man (as an individual and as a member of society) to be the end and aim of law. It is the same conviction, too, along with the philosophy

upon which it reposes, that leads him at once to the rejection of such things as the levelling influence of Socialism, and the rejection, also, of the view of those who forget that "technic" and "wealth," and the endless advance of science are, after all, indispensable steps in the evolution of the higher quality of human nature and of social justice.

Unlike many Hegelians, however, Kohler sees the place of the individual, and of the creative activity and the economic independence of the individual, in culture and progress. He has words of praise for an intuitive thinker like Nietzsche, who is often contemptuously dismissed as a romanticist, or an ego-maniac, by rationalistic and positivistic philosophers. Nor again is philosophy to Kohler a mere reflection upon the past achievements of the human spirit, or upon any organized polity [the Prussian States to Hegel] as the incarnation of the World-Reason, or upon the closed circle of the logic of a perfectly constructed science. It is not true for him that: "The owl of Minerva takes its flight only when the shades of night are falling;" for he is a progressivist and futurist in all respects. The world is still "young" to him, and we are only in the morning of the work of the conquest by man of his environment and of himself. He is as idealistic and utopian about the future of civilization as are any of the younger peoples of the earth, or any of the believers in the future of science and of knowledge and of effort. "Humanity is destined to a deep knowledge of the world and of the supramundane. It is destined to form and to rule, to form in the sphere of art, to rule over the earth; and perhaps by virtue of technical science, over other fields of the universe."

Some of the additional remarks that one feels inclined to make upon this matter of Kohler and his Hegelian

Idealism are the following. He has so assimilated the spirit and the manner of Hegel that his book is a veritable victory of mind over material — an object lesson in methodology and completeness to all future students of the first principles of law. Many of his sentences leave upon the mind the same sense of mastery, and finality, and pregnant wisdom, that we catch in the "Logic" or the "Phenomenology" or the "Philosophy of History," of Hegel. Take this sentence for example: "Material culture must not stray into paths where the mind cannot follow it, where it would grow unreasonable and offend against the principles of moral life in particular; for lack of morality is lack of reason."

Kohler thinks too in the terms of the recognized categories and points of view of the mental and moral sciences, and his work has, in an eminent sense, the appearance of an ordered whole. He sees clearly the errors of the Hegelian "intellectualism," and he is more truly historical and positive than Hegel. And despite his comparative injustice to Kant and the "Categorical Imperative," he is more truly ethical than Hegel. Indeed the remarkable and all-persuasive ethical character of his book brings his face closer to the sage of Königsberg than does the letter of his pages about the mere "subject-object" philosophy mouthed about years ago in England by Coleridge. And lastly — and this is an important point — in his doctrine of the *relativity* of all law, of its necessary change and adaptation to altering, and to new, conditions, he breaks definitely with the Procrustean "absolutism" of some German and some English Neo-Hegelians, and comes for practical and rational purposes into a desirable relation to the truth of the American philosophy of Pragmatism,[2] and to the

[2] See the chapter upon "Pragmatism as Americanism" in the writer's "Pragmatism and Idealism" — A. & C. Black, London, Macmillan, N. Y. (1913).

"experimentalism" and the "philosophy of hypothesis."[8] of modern science (Mach and Poincaré as well as James and Dewey).

As for a word in respect of the comparison of this book upon the Philosophy of Law with similar works in this Legal Philosophy Series, or outside it, it may be said that Kohler, although just as ethical in his ultimate attitude as Lasson, is more intellectual in the right sense of the term, standing for the need of rational comprehension in the realm of ethical reform, for the idea in fact of the danger of ethical and social reform without comprehension of "end" and "purpose" and without system, or without fundamental truth to human nature. His work, again, is a valuable supplement to the fine book of Berolzheimer in the series, because Berolzheimer is in the main historical in his treatment, while he [Kohler] is systematic, exemplifying the results or the first principles, of all legal history. It is hardly to be wondered at that Kohler as a finished philosopher, as a man who (like Aristotle) always seeks for the meaning of "development" in the light of the "end" or the "purpose" it seems to subserve, should think himself beyond the mere beginning of the philosophy of law represented in the otherwise epoch-marking work of Ihering.

III. The thorough "modernity" of the work of Kohler (in spirit, scholarship, and affiliations) is amply exemplified by such characteristics as the following: (1) the up-to-date character of his psychology, his treatment of the "dispositions," impulses, motives, intentions, purposes, the "springs" and roots of the conduct of men in the business of life (matters of the utmost importance in several departments of law); (2) the thoroughly sociological character of all his work, along with the fact that he is not like too many writers

[8] See *ibid.* chapter III.

of the day, entirely submerged and swamped by the sociological trend or bias; (3) the accompanying recognition of the relation of the legal activities of men to ethical, and religious, traditions and beliefs and convictions; (4) the perfect methodology and "logic" of his work, to which reference has already been made; (5) its opposition to the mere temporal demands of the "masses"; and (6) lastly (and again) its progressive, optimistic spirit, its faith in "achievement and aspiration" and in the great "cultural mission of humanity."

IV. It is impossible, I think, to terminate this introduction without referring to the great advantage to the United States of all the far reaching knowledge of German and continental thought represented by the work of all these translators and editors in this Series. As I have attempted to express it elsewhere,[4] the American scholar of to-day in the best universities does not attempt the work of exposition or creation without an exhaustive and codified knowledge of what has been done in his subject in other countries. The very greatest things therefore, in the way of constructive work, are to be expected for the United States and for the world as a result of all this preliminary thought and research, in respect of the right kind of foundation and beginning.

[4] In the work already referred to.

AUTHOR'S PREFACE

My effort, here, is to present, as a system, philosophical ideas which have become fixed in the maturity of thirty years of study of ancient and modern philosophies, and an investigation of the laws of various peoples. I do this with all the more satisfaction, for the reason that the lectures at this University on Legal Philosophy and Comparative Law have been for me always subjects of special interest and attachment.

A situation that thirty years ago was hardly to be anticipated has now been realized: the inclination in favor of Legal Philosophy has grown anew; and the legal philosophical consciousness of our jurists has again started to develop.

That a pure historicalness boots nothing, that the simple cleaving to the practical debases our juristic thinking, that mere construction of positive law does not suffice — all this has become very plain in the last decade. The many problems of legislative policy alone must have demonstrated that positivism in the law is without value; and he who is concerned with legislative policy, has already half entered the domain of philosophy; for, whoever unites legislative policy with history is already aware that every age has its own necessities to which its mission must correspond. Study of the legal missions of the various periods of time, and investigation of ways and means by which they may be satisfied, lead at once to the problems of cultural and legal evolution; and clearly show the luxuriance of ideas which struggle to expression in the life of the peoples, as product of the prodigious psychical labor which humanity as a whole is able to accomplish.

A unity of spirit rules mankind and evolution forces its way out of universal substance; thus have the greatest thinkers of all ages spoken, from the Vedanta philosophers, and the Persian Sufis, up to Averroës, Eckhart, and Hegel. Legal Philosophy attains its high consecration in the thought of this unity; and the illustrious ideas of Hegel, with proper correction, have again, in the course of events, come into the foreground, after philosophy, and therefore, also, Philosophy of Law, had slumbered for two decades.

Materialism is dead; the philosophy of Spirit still lives.

JOSEF KOHLER.

BERLIN, October, 1908.

Philosophy of Law

PHILOSOPHY OF LAW

CHAPTER I

THE PHILOSOPHY OF LAW AND ITS SIGNIFICANCE

SECTION I

INTRODUCTION

1. The Philosophy of Law is a branch of philosophy, of that philosophy which deals with man and his culture. Its purpose, like that of every philosophy, is to examine what underlies the realm of phenomena; and to explain to us whether there are powers, and what they are, behind what we have perceived with our senses, and what our reason has given us to understand. Direct perception by the senses and its treatment lie within the province of the science of experience. But the question whether, after the science of experience has done its part, there is still a deeper significance in the results, belongs to philosophy.

2. More is to be said of this in dealing with philosophy as an auxiliary science. But, above all, it must be explained here that the Philosophy of Law, as a branch of the philosophy of man, is concerned with searching out what underlies human existence, and what is the deeper significance of human activity.

3. Human activity is cultural activity. Man's task is to create and develop culture, to obtain permanent cultural values, thus producing a new abundance of forms which shall be as a second creation, in juxtaposition to divine creation.

4. To expound the deeper significance of this creation of culture is the task of metaphysical science. To examine more closely into it is an important undertaking that would carry us beyond the confines of the philosophy of culture and man, into the sphere of universal world culture. All that we can do here simply is to assume as granted that the promotion of culture is one of the tasks, or rather, *the* task of humanity.

5. Only so much must be borrowed from the universal domain of world philosophy: culture is constantly developing, and humanity must guard the existing cultural values and continue to create new ones. Culture must move forward. Its progress, however, is not a simple advance; rather, its development proceeds in such manner that the seeds of the new are already present in what exists, and, as the one grows and the other decays, new values are constantly created out of the old.

6. In the evolution of culture, the law has its place; for human civilization is only conceivable if there is a system among mankind that assigns each man his post and sets him his task, and which takes care that existing values are protected and the creation of new ones furthered.

7. This (system of) law cannot remain unaltered. It must adapt itself to a constantly advancing culture and be so formed that conformably to changing cultural demands it promotes rather than hampers and oppresses it. Thus every culture has its definite postulates of law, and it is the duty of society, from time to time, to shape the law according to these requirements.

8. Hence, there is no eternal law. The law that is suitable for one period is not so for another: we can only strive to provide every culture with its corresponding system of law. What is good for one would mean ruin to another.

9. The law, as it should be to correspond with the culture that exists, is not always in accordance with the existing law, for in many instances the persons or bodies in authority do not perceive what is needed; certain requirements remain unconsidered, or the proper means are not used to meet them. In such cases endeavors in two directions are justified: the effort to have the law altered to conform to the cultural needs, and the effort to find an interpretation of the law that will, so far as possible, harmonize with the demands of culture.

10. Up to within a hundred years ago, people talked of a law of nature and believed that there was a fixed permanent law suitable to all times which merely had not always been realized. This view is connected with the further opinion that the culture of humanity, called into life by God, is, once for all, complete, so that, at the most, only trivial changes can be necessary; accordingly, the law should be shaped to correspond to the divine commandments. In other words, people assumed that the world had already reached the final aim of culture, and, as this culture was once and forever perfect, so, too, would be the law that conformed to it.

Yet this Natural Law has a long history: it did not thrive in the times of the real law of nature but in that of the Scholasticism which joined hands with Aristotle, who had long lapsed into oblivion, to be re-discovered later.

EXCURSUS

In its beginnings, Natural Law goes back to our lord and master, Aristotle, and to the seventh chapter of the fifth book of his remarkable "Nicomachæan Ethics." The so-called Natural Law of Hugo Grotius and his successors is nothing but vain repetition of the ideas that the Scholastics produced in the midst of a stormy battle of minds. In place of the richness and life which we find in the Scholastics, after the period of Hugo Grotius we see nothing but stagnation and strained effort; and whereas, in the Middle Ages, Natural Law protected the nations against the caprice of princes and papal power, defended German from Roman law, and upheld the demands of what was reasonable in the face of what had became historical, since Hugo Grotius it has scarcely done more than perform the admittedly important service of forming the basis of international law. It was not vitalized until, in connection with the contractual theory of the State (*Staatsvertrag*), the idea of the rights of man arose, not for the first time, by the way; for the Scholastics had given utterance to similar ideas long before Jean Jacques Rousseau, and long before the American colonists and the French Revolutionists tossed the doctrine of the rights of man like a burning torch into the masses of the people.

The fundamental idea of Natural Law thus began with Aristotle, and continued up through the Stoa into Roman law, and into the Middle Ages. Aristotle was headed in the right direction. He assumed that even though the law be susceptible of constant change, it must yet contain an inner uniform power that seeks to turn us in the direction of welfare. But where this course lay, and what the relation of this constancy is to the mobility of history — these points were the cause of a tremendous struggle in the Middle Ages.

Scholasticism it is true, owing to its starting points, could only arrive at a partially correct solution, for it adhered to the acceptation of the Bible and to the inviolability of the tenets of the faith; hence it could never attain to a free and impartial consideration of constantly developing culture, nor appreciate at its real value this striving for culture except within the limits set up by religious dogma. It could not contrast one religion or system of morality with another, and comprehend both as different planes of culture and relatively justified expressions of the human mind, but was obliged to accept what the Church taught; and even though it might be believed that dogmas sometimes developed more and more as the age advanced, an historical interpretation of all human modes of thought was nevertheless impossible.

Aristotle was correct in thinking that the common inner nerve of the different systems of law is directed toward adapting the law as a whole to the civilization of the present, thus contributing to the advance of culture and the welfare of humanity. Even Aristotle, then, recognized that the law cannot be arbitrarily fixed, for the established law may run directly counter to the demands of the law of reason; hence the law must strive to serve the development of culture as it stands, and, as civilization is ever changing, the law must change with it. Only in as far as the different civilizations contain something that is common to them all, should the law be uniform in its elements, and when we seek to approach a cultural ideal, certain propositions may be established as the leading principles of that ideal. It must, however, be constantly borne in mind that a cultural ideal is always only relative, and with every change in culture, a new ideal will confront us. A system of law within the pale of Mohammedan culture

could never be the same as the law of the Christian or Buddhistic world. The Scholastics were obliged to set up certain tenets of the Christian canonical culture as absolute principles, and if they kicked over the traces, they had to reckon with the ban of the Church. Hence, it is comprehensible that the character of their discussions often seems very strange to us, and we should never forget that beneath their reserved utterances the deepest thoughts were sometimes concealed unable to find a way to the light. They were occupied with two questions in particular, questions that never concern us now: why, in the Bible, God himself ordered things to be done that were contrary to the ten commandments, and whether it were ever permissible to depart from the ten commandments; that is to say for instance, whether under certain circumstances a man might not kill, particularly in self-defense. The first group of cases, for example, that God commanded Abraham to sacrifice his son, we regard in an entirely different light, merely as a reference to the custom — common to all Semitic peoples — of sacrificing their children. (Compare Augustinus, "Civitas Dei," I, 21; XVI, 32.) The second group we explain today by saying that the rules of law and morals are never absolute but always embrace a number of ifs and buts, as, for instance, the exceptional right to kill in self-defense.

But these discussions had a still deeper, political significance. If God had made exceptions in certain cases why should not his representative, the Pope, do the same? And why not his anointed, the king? And so a new course was set, and imperial and papal power was increased.

But here the Dominicans created a salutary barrier. Albertus Magnus and Thomas Aquinas contended that the law rested on eternal principles, and no deviation

was permissible except in certain directions, though what these directions were was still the subject of much doubt.

The Franciscans opposed this view, and especially Schopenhauer's predecessor, the great voluntarist, Duns Scotus, whose importance in the history of the world has recently been recognized. He was the apostle of the Will who had seen deeper into its workings than anyone before him. He perceived that the Will is not so much the servant of the mind as its lord, and so to him, as to Schopenhauer, God was more will than intelligence, and the law valid not because it is reasonable but because it is the will of God. This opened the flood-gates and the curialists were able to increase the power of the Pope immeasurably. Thus did Duns Scotus break the way and skepticism as regards reasonable Natural Law spread in all directions. More than ever before, the relativity of the law was recognized. Duns Scotus even went so far as to advocate polygamy when great losses of men endangered the existence of society.

But later the pace was slackened. Occam especially tolled the death-knell of imperialism while the Schism and the Council of Constance led to a decrease in the papal power and bowed it beneath the decree of the bishops.

Averroës, who as a sufistic pantheist was not bound by ecclesiastical dogma, was the most correct in his ideas.

Between the two stood the jurists like, for instance, the great Bartolus and Baldus. To them the relativity of the law and its connection with culture was a vital question; otherwise they would not have been able to adapt the Roman law to Germanic conditions. But here, too, the development ran to seed; Bartolus, Baldus, and Albericus de Rosate were followed by small minds whose pettifoggery was just as aggravating as

the pettifoggery of the nineteenth century, because they lacked the vitalizing connection with philosophy.

When, at the time that the power of the Netherlands was rising rapidly, Hugo Grotius joined hands with the Scholastics; he represented the intellectualism and inflexibility of Natural Law, in a way such as had never been taught either by Albertus Magnus or Thomas Aquinas. Under his manipulation Natural Law was no longer the resilient law that adapted itself to culture and furthered its advance; it was no longer the vitalizing force that permeates everything: he and his successors represented it to be a motionless cloud that hung like an incubus over life and smothered progress. And Wolff's Philosophy of Law which dominated the time of Frederick the Great is one of the most sterile, pedantic, and wretched efforts that can be found in the whole history of mankind.

At the beginning, Natural Law may have had significance as a protection against arbitrary rule, but this it soon lost, at least in Germany and France, and became instead the hobby of well-meaning absolutism which undertook to maintain Natural Law by setting its foot on the neck of the nation and trying to force it to be good, just, and happy. The theory of the contractual origin of the State (*Staatsvertrag*), too — as if the State had been formed by agreement of the individual members — a theory that had become a dogma since Hugo Grotius, was modeled by the great Hobbes into a shield and defense of the princely aristocracy of the Stuarts until the revolutionary minds in France broke loose, and Rousseau with his theory of the *contrat social* unfurled the red banner of rebellion.

This brings us to the threshold of the modern Philosophy of Law. After the historical school of law under Savigny had demolished rigid Natural Law, and Hegel

had taught the idea of evolution, we might have hoped that a new period of growth in the Philosophy of Law would set in. But this was not the case. The collapse developed by the powerful sequence of ideas of Hegel and Schelling brought a vast retrograde movement in German thought. Great ideas were replaced by hair-splitting discussions of petty details, and the elucidation of some passage in the Prætorian edict was considered of greater importance than an examination of the formative principles of law. A phenomenal work like Hegel's "Rechtsphilosophie" was followed by amateurish platitudes like Ihering's "Zweck im Recht." The lofty thoughts of men like Bartolus and Voet, which prepared the way for a reconciliation between the needs of the present and legislation, gave place to a work like Windscheid's "Pandekten," the leading idea of which was that the sense of justice is not a source of law and must therefore bow dumbly to legislation, so that the laws themselves became implacable tyrants. The philosophic jurist was gagged and bound; it was considered antiquated and inelegant to speak of the Philosophy of Law at all.

All this has changed. In place of pettifoggery the science of comparative law stepped in, uniting all details in a world-embracing whole. Philosophy of Law attaching itself to Hegel has been revived as Neo-Hegelianism which sifted out what was antiquated, and, in close touch with the universal study of law, introduced anew into this study the doctrine of evolution. One of the first, however, to recognize the value of the science of comparative law was not a jurist, but a philosopher whose like, since Hegel, the world has not seen — Nietzsche.

SECTION II

PHILOSOPHY AND THE PHILOSOPHY OF LAW

1. As the philosophy of mankind, the Philosophy of Law must be based on the world; for only as a part of the world and as a lever of the world-process can man's significance be comprehended and his activity judged. At the same time it is universal philosophy that gives us the possibility of understanding the meaning of evolution and thus makes clear what this evolution has to do in human life.

2. Primarily the theory of the validity of knowledge comes under consideration, that is, the question of the relation between subject and object, and the question whether our ideas of the world are based in reality on a world, and how this reality is placed in respect to our perceptions. This is the tremendous question of critical realism which, already touched on in the ancient world, was later raised by such scholars as Tommaso Campanella, further discussed by the great Scotch skeptics and finally pressed to a certain conclusion by Kant, a conclusion in the sense that the problem was thenceforward more sharply defined, not in the sense that Kant found its correct solution. The assumption that it is altogether impossible to penetrate into the thing-in-itself, so that we are thrown back into the region of our own ideas, rests on the mistaken dualism that was bequeathed by Kant. This dualism, with its constant skepticism, and its "Ignoramus" as regards the outside world, has long since been left behind, and with it the supposition that time and space are based only on our conceptions and are added by our minds.

Far rather, we must say that the ego and the non-ego belong to one great world-whole, and that consequently agreement must exist between them, and especially that time and extension, as our mind has perceived them for æons, must correspond to our perceptions of time and space as the human mind and even the beings that preceded man have received this permanent impression from one generation to another.

But if this be so, if we are to assume such an agreement, then we can gladly enter upon an examination of the world by leaping across the chasm that seems to divide the ego from the external world; and having once done that, we can continue, by means of our reason, to construct the meaning of the world, and with the laws of our thought go back to a deeper, more valid foundation.

3. The whole dualism mentioned above is so monstrous and unstable that it immediately collapsed before the onslaught of energetic thinkers. Fichte and Schelling sought to unseat it, and Hegel completely demolished it ("Philosophy of Identity"). Of course the ego is only a single offshoot of the great universe and when we regard the latter we do indeed place ourselves in opposition to it for a moment, but we do so as a part of the whole and this attitude must vanish at once from our mind as soon as the process of contemplation is at an end. My remarks in the "Archiv für Rechtsphilosophie," I, p. 488, apply to this "Identitätsphilosophie."

"If the ego, apprehends the non-ego, that is, the external world about it, as an object, then the external world becomes unified by perception with our own ego, and thereby forms an entity independent but homogeneous to our own ego.". . . "For the world as the object of perception is intrinsically equal to the ego inasmuch as the latter is also the object of perception, and thence

results of itself the consciousness that the world and the ego must exist outside of us and yet be connected with our ego."

Hegel, as always, expresses it best ("Phenomenology of Spirit," p. 161): "I distinguish myself from myself; and therein I am immediately aware that this factor distinguished from me is not distinguished. I, the self-same being, thrust myself away from myself, but this which is distinguished, which is set up as unlike me, is immediately on its being distinguished no distinction for me."

4. The chief error in Kant's philosophy lies in this, that the difference between subject and object is exaggerated until it becomes monstrous. According to Kant's theory of knowledge the subject, on the one side, stands all alone in the auditorium of the theatre, and before it is the stage where the performance goes on, signifying the world. Between these two things there should be some connection, but far from that: what we perceive is only a phenomenon, a consequence of phenomena, and all that is behind the phenomenon is hidden from us forever; for all our mental powers can be concentrated only on the phenomenon. We can make combinations of phenomena, but the management of the stage with all its machinery is permanently concealed from us.

This whole representation is ill-chosen for this reason, if for no other: that it makes such a difference between the pitiable ego and the whole world, that a vast chasm separates them, that it is scarcely worth while to go to so much trouble for the sake of one individual! But how is it with the tremendous crowd of other egos that also gaze into the world? To the first ego they too are, of course, a part of the world, and what he sees of them likewise is merely phenomenon, while the thing-in-itself

also, as regards them, is enveloped in fog. In addition, the ego itself is ego only in as far as it perceives itself, while the body with all its pain and suffering is also merely a phenomenon, and actually is also behind the clouds that surround the thing-in-itself. And, after all, even the ego itself is surely our ego only in as far as it is the subject; as soon as we regard our own self as an object, it too dives into the thing-in-itself and we behold only a phenomenon. We have a real ego and a phenomenon-ego.

5. The idea of the thing-in-itself is appropriate in this, that naturally every reflection, every effect on subjectivity can only be so understood that the thing-in-itself does not enter into the subject, but only makes an impression; and it is this impression that we see as the image of the world. Thus exact similarity can never, of course, exist between the impression and the world, any more than it can between the form and the image that is cast in it. Nevertheless it must be reasonably possible not indeed to give a duplicate of the form but still to say in how far our impression agrees with it, and to what extent subjective elements enter into this impression. And our reason is capable of doing this, for it can comprehend our organs and their activities, and hence also understand what the effect is on them when an impression is received from outside. This is especially the case because these organs can experience the most different impressions from which the unchanging original determination and attitude of subjectivity can be derived that confront the objective world. In other beings, too, we find similar organs and can ascertain how they operate and how they are influenced from outside by the form. Beyond that, of course, we are not able to go; nor is it necessary to do so, for this knowledge is complete. No being can say what the image of the universe is, if in thought the being

that observes it is omitted; for *in that case any image at all immediately becomes impossible.* We can only say: in the universe there is a plenitude of different objectivities that operate on our subjectivity which represents the slate on which the images appear, but which is so constituted that we can deduct what is subjective. We know, for instance, when we see red and yellow that the character of the color is an addition made by our organs of sight and our reason; but just so, it is certain that the difference in the color must be based on a difference in the object of which we know nothing more than that vibrations of the ether have something to do with it. That to another eye and another mind, the colors may appear different, is clear, but that does not alter the matter.

In the same way, we know that a difference underlies the objects that we see simultaneously and those that we see successively, and thence we derive the abstraction: space and time. But that we cannot conceive of anything spaceless and timeless is not because space and time are a creation of our own minds, but because in all our concepts we are dependent on what the world offers us; and though we may connect, may add, or leave out in thought, yet, we can never change the whole nature of anything; just as it is impossible for us to imagine an object in another color than those which we know (at most, in such a way that another combination or gradation is introduced). That something else must underlie the concept of space and time is certain. But that is the case with all objectivities; for they are the moulds of the impressions that we experience. At all events, there can be no doubt that to the time and space difference in us, there must be a corresponding time and space difference in the world.

This is quite wonderfully expressed by Hegel, "Phenomenology of Spirit," p. 138:

"Certainly there is no knowledge to be had of this inner world, as we have it here; not, however, owing to reason being too short-sighted, or limited, or whatever you care to call it (on this point there is as yet nothing known at this stage; we have not gone deep enough for that yet), but on account simply of the nature of the case; because in the void there is nothing known, or putting it from the point of view of the other side, because its very characteristic lies in being *beyond* consciousness."

And in the same work, page 140:

"We distort the proper meaning of this, if we take it to mean that the supersensible is therfore the sensible world, or the world as it is, for immediate sense-certainty and perception. For, on the contrary, appearance is just not the world of sense-knowledge and perception as positively *being*, but this world as superseded or established in truth as an inner world. It is often said that the supersensible is *not* appearance; but by appearance is thereby meant not *appearance*, but rather the sensible world taken as itself real actuality."

6. If we stand in the world in this way, then it is also comprehensible that the results of our thought must agree with the world to the extent that the factors in the objective world which make impressions, must be as our thought grasps them, assuming that we start from the right premises and make no errors in our conclusions. This is not perhaps a "pre-established harmony," not chance; rather it is based on the fact that we are a part of the great whole with which we confront ourselves only at times to disappear again in the whole. During the time that it confronts us the whole still continues to have its effect. It is a piece of machinery of which we form a part and in which the results of the motions of the machinery must correspond to one another;

that is to say, if the machinery is in order and no pathological development has set in. Thus, of itself, the correctness of the axioms in mathematics is explained; the agreement of the law of causality within us and outside of us is explained, and Kant's whole list of categories. Here, too, it is not necessary that our minds should scramble about fruitlessly in front of the scenes; rather it is possible for us if not indeed to look behind them, yet, by means of our intellect, to ascertain what goes on there, or at least to find out in what way the factors that cause impressions play behind the scenes whose various activities correspond to the various effects on the surface.

7. The whole assertion that it is not possible for our power of judgment to penetrate into the region of the metaphysical rests on the erroneous assumption that the metaphysical is something so totally different from us that we have no points of contact with it. But that is not so. Even though the metaphysical be not accessible to our perceptions, yet it is so to our thought. If it is impossible for us to comprehend anything eternal in our view, yet it is possible for us to put something eternal into mathematics and to work with it. And in this lies the whole kernel of metaphysics. It is necessary to exceed the bounds of time and space, and to construct something beyond their limits; and this we can comprehend in our ideas making it the subject of our thought. The assumption that the table of categories reaches only as far as our perceptions is purely arbitrary: it is true only in as far as a category presupposes time and space, which is not the case, for instance, with modality. It is pure arbitrariness to assert that the principle of identity and of contradiction is attested only in the circle of the perceptions.

8. Accordingly, Kant's whole system of thought,

tremendous as are the efforts that have been spent on it, is a maze. It is a mental gymnastic exercise with the most monstrous movements and distortions in which the straight is bent crooked and the crooked straight. But just because it is a maze, it is futile to follow it, at least beyond the point where it becomes clear that it leads nowhere. It is an off-shoot of the Scotch thought, that extends from Hume and Berkeley up to Kant, a maze that had to be made and on which Kant lavished the highest powers of his gifted mind that still showed clearly traces of Scotch descent.

A return to Kant could only be preached by an age of philosophic barrenness that was not in a position to adapt Hegel's philosophy to the period, and therefore thought it more advisable to edify itself with the acrobatic arts of Kant's mental gymnastics. Wherever a real theatre is lacking, people delight in acrobatic performances. It is comprehensible that Zeller, for instance, should call people back to Kant, but less so that so many should follow him.

9. This destruction of Kant's dualism was brought about unnoticeably through the identity philosophy, which, starting with Descartes, was carried on by Schelling and brought to an admirable completion by Hegel, the main idea of which is that the difference between subject and object is only a relative one, and that therefore there can be no question of such a confrontation of the ego and the external world. They can stand opposite each other only for a moment, and essentially the activity in the external world and the activity of our own ego are the same, and each of us is "a breath of eternity" (*ein Hauch der Ewigkeit*).

Hegel developed this idea still further by calling the world process progressive logical thought with a constant thesis and antithesis and their reconciliation, so that

in this way a continual progression takes place from one to the other; a progression in the development of the great cosmos as well as in humanity. Thus history becomes a magnificent growth out of which new ideas constantly spring which gradually settle and clear, thus establishing the connection between the past and the future in a splendid manner. And this is done not so that past and future stand in a neutral relation to each other, but so that the future is formed by the progress that has its rise in the past. Thus unified life arises in the world. Everything germinates, sends forth shoots, and strives toward farther and more distant aims; while formerly facts alone ruled, the Idea now holds sway.

This tremendous achievement of Hegel's reconciled the difference between being and non-being on which the earlier philosophy of the Eleatics came to grief, through the principle of becoming (*Werden*); for becoming is the mediation between being and non-being and what is becoming, is; as the old sinks into the depths of the past, the banner of the future already flutters before us: this has become the basis of all the mental sciences, and above all, of our philosophic education. That it should have been thought possible to ignore Hegel and to return to Kant only bears witness to the great philosophic decline of the last decades of the nineteenth century. The philosophy of the twentieth century must take Hegel for its starting point and Hegel's fundamental idea, evolution, is the scientific principle of all mental science, of our whole history, and of everything that lives and moves in our human culture; it is the fountain of youth for all our scientific thought.

At many points, it is true, we must deviate from Hegel and proceed with a reconstruction; for it is not true that the development of the history of the world is so logical and that everything goes forward in three-

part time. On the contrary, we find a great deal that is illogical and unrhymed; so much so, that what is magnificent sometimes perishes never to be seen again and that times of strongly pronounced decline, pathological periods in the life of mankind, appear which are not in line with evolution, but are rather directly opposed to the course of our development. (p. 39 (4).) In other ways, too, human progress by no means always corresponds to the development of our thought; for reason and brutality operate side by side with wisdom and stability. Moreover we must also take into consideration that the ways traveled by the history of the world are extraordinarily manifold and have thousands and thousands of ramifications. It follows that:

a. The logic of the world's history is mixed with much that is illogical, and it is not possible so to construe the course of progress that everything unfolds in accordance with a definite logical spirit. Side by side with reason, stands its opposite, and the greatness of the world's history is attested simply by this, that in the final development, it is reason that triumphs.

b. The great multifariousness in evolution makes it impossible to set up certain types of development for all cases by which universal history may be judged. Any process that has for its object the deduction of the future from the past by logical inference would be entirely inadmissible. History must be studied in detail. If on a journey, for instance, we know the starting point and the destination, this gives us no knowledge of the course that lies between them; and so it is with the development of the world. Even if the advance appears sure, yet the way is altogether uncertain, and history shows us a charming, often too, it is true, an affecting, tragic diversity. This makes the study of history more complicated, but also infinitely more attractive, for

evolution shows itself in an unmeasured multifariousness. Just as it would be foolish for anyone to attempt to trace the numberless varieties of the rose back to the original type, so, too, it would be a mistake to base the development of the world's history on one and the same logical principle.

10. The excess of Hegel's logicism (*Logizismus*) was opposed by Schopenhauer, who declared the blind will to be the determinative power; and especially by Nietzsche, who went so far as to assert that more unreason than reason ruled the world. The truth of the matter is clear from the explanation we have just given.

The view, however, that accepts Hegel's philosophy of identity and doctrine of evolution on the one side and, on the other, rejects his dialectics, (that is, the theory of a thoroughly logical, rhythmical growth,) and which, in particular, refuses to pigeonhole the world's history on the basis of the three-part time development, is Neo-Hegelianism which forms our point of departure.

Hegel's development of Idea becomes, as regards man, the development of culture; we assume that culture constantly progresses, not in regular succession, it is true, but with interruptions and with many limitations and irregularities. Culture, however, becomes the mental security of the nations. It is the mighty aim toward which we strive, the culture of knowledge on the one hand, and that of new production and new activity on the other; which again is divided into esthetic culture, and the culture that controls nature. To know everything, to be able to do everything, and thus to master nature — that is the final aim of the development of culture, and to have grasped this is the characteristic feature of Neo-Hegelianism.

11. Only since Hegel have we known the true nature of history. Everything that was produced in history

before that time, or that was produced later by those who rejected Hegel's doctrines, was merely a fruitless collecting of details that always ended in shallow, trifling pettiness. Herder, who dimly anticipated Hegel's doctrine of evolution, was an exception, and Goethe too, in whose all-embracing mind Hegel's ideas also sounded.

In the greatest work of genius that the nineteenth century has produced, in the "Phenomenology of Spirit," Hegel explains this significance of history: "The goal, which is absolute knowledge, or Spirit knowing itself as Spirit, finds its pathway in the recollection of spiritual forms as they are in themselves, and as they accomplish the organization of their spiritual kingdom. Their conservation, looked at from the side of their free phenomenal existence in the sphere of contingency, is history; looked at from the side of their conceptually comprehended organization, it is the science of phenomenal knowledge, of the ways in which knowledge appears. Both together, or history comprehended conceptually, form at once the recollection, and the golgotha of Absolute Spirit, the reality, the truth, the certainty of its throne, without which it were lifeless, solitary and alone. Only

> "This chalice of God's plenitude
> Yields foaming His infinitude."

And his beautiful thoughts on ancient art are also true of historical knowledge in general:

"The statues set up are now corpses in stone, whence the animating soul has flown; while the hymns of praise are words from which all belief has gone. The tables of the gods are bereft of spiritual food and drink, and from his games and festivals, man no more receives the joyful sense of his unity with the Divine Being. The works of the muse lack the force and energy of the

Spirit which derived the certainty and assurance of itself just from the crushing ruin of gods and men. They are themselves now just what they are for us — beautiful fruit broken off the tree; a kindly fate has passed on those works to us, as a maiden might offer such fruit off a tree. It is not their actual life as they exist, that is given us, not the tree that bore them, not the earth and the elements, which constituted their substance, nor the climate that determined their constitutive character, nor the change of seasons which controlled the process of their growth. So, too, it is not their living world that fate preserves and gives us with those works of ancient art, not the spring and summer of that ethical life in which they bloomed and ripened, but the veiled remembrance alone of all this reality. Our action, therefore, when we enjoy them is not that of worship, through which our conscious life might attain its complete truth and be satisfied to the full; our action is external; it consists in wiping off some drop of rain or speck of dust from these fruits, and in place of the inner elements composing the reality of the ethical life, a reality that environed, created, and inspired these works, we erect in prolix detail the scaffolding of the dead elements of their outward existence — language, historical circumstances, etc. All this we do not in order to enter into their very life, but only to represent them ideally or pictorially (*vorzustellen*) within ourselves. But just as the maiden who hands us the plucked fruits is more than the nature which presented them in the first instance — the nature which provided all their detailed conditions and elements, tree, air, light and so on — since in a higher way she gathers all this together into the light of her self-conscious eye, and her gesture in offering the gifts; so, too, the Spirit of the fate which presents us with those works of art is more than the ethical life

realized in that nation. For it is the *inwardising* in *us*, in the form of conscious memory (*Er-innerung*), of the Spirit which in them was manifested in an outward, *external* way; — it is the Spirit of the tragic fate which collects all those individual gods and attributes of the substance into the one Pantheon, into the Spirit which is itself conscious of itself as Spirit."

Has anyone ever grasped universal history with deeper comprehension?

12. As has already been mentioned, the period following Hegel was one of tremendous decline for the Philosophy of Law. The short-sightedness that has led people to believe it possible to build up a Philosophy of Law without philosophy took a bitter revenge. Natural Law came again to the fore in a new form, and led to a sort of positivistic Philosophy of Law. Natural Law could not of course be identified with positive law, but from different systems of law and various postulates of law a concoction was put together that was then called the Philosophy of Law. Books like those by Ahrens, Krause, Röder, are not even worth while enumerating; they are the products of utter banality and poverty of ideas; similarly barren are the writings of Merkel who tried to construct a universal doctrine of law out of a scanty knowledge of several legal systems, and, by his sham reconciliations, contributed to the decay of juristic thought.

Merely for the sake of completeness two other experimenters must be mentioned; first, Ihering, who, in his "Zweck im Recht," believed that he had discovered the great idea that the law must have a purpose and an aim; though as to the nature of this purpose he did not get beyond a few stammering remarks, yet his superficial brilliancy easily dazzled the loftily wise juristic public. As a matter of fact, purpose in the law is connected with

the whole development of legal culture, and that can only be understood on the basis of Hegel's doctrine of evolution, and from it alone can the ends of the law be deduced: they are cultural aims, and the nature of culture is made up, as was explained above, of what Hegel endeavored to present in his conceptual dialectics. Ihering's whole attempt came to grief on the rocks of a deplorable dilettanteism; only an unphilosophical mind like that of Ihering himself could find satisfaction in it.

Another attempt, by Stammler, takes Kant as its point of departure, and proceeds as if Hegel had not existed at all. Stammler recognizes that, in contrast to the old Natural Law, the law must change, and that therefore all discussion of a perfect or complete law must be in a purely formal sense. This formal law, he seeks to represent as a system of justice through law, and this again he deduces from various criteria. These criteria originate in the magnificent growth of advancing human culture; but he believes them to be found in the definite requirements of individual or social life that exist once for all, and in this he is entirely in error. Nothing could be more preposterous, for instance, than to say: at no stage of human culture has slavery been just. This is the result of the retrograde movement from the historical basis of Hegel back to the non-historical exposition of Natural Law of Kant. This whole school of thought, including Neo-Kantianism, may well be buried and forgotten.

13. The salvation of the Philosophy of Law can only be accomplished by starting with the reconstruction of Hegel's doctrine and interpreting his doctrine of evolution to mean that mankind constantly progresses in culture in the sense that permanent cultural values are produced, and that man becomes more and more god-like in knowledge and mastery of the earth. Only when

based on this foundation can the requirements of the law be recognized as the requirements of the advancing culture which the law is to serve, and only in this way can the true aim of the law be known for what it is.

14. Lasson's Philosophy of Law alone gives us cause for rejoicing. He, the comprehensive thinker, the keen logician, was the only one to perceive that the welfare of philosophy was dependent on an intimate relation to Hegel; and when, building upon Hegel, with a foundation of later historical material, we do so also in the hope that we are acting in agreement with him.

15. The Philosophy of Law, as indeed philosophy in general, has recently been much furthered, thanks to the great mind of Nietzsche, who subjected the prime cultural questions anew to searching thought and established some of them on a new basis.

CHAPTER II

THE DEVELOPMENT OF CULTURE

SECTION III

LOGICAL AND ILLOGICAL ELEMENTS

1. It has already been said that what is logical in history is mingled with much that is illogical. These illogical elements form the realm of blind chance which prevents development in accordance with fixed, stable principles, and constantly runs athwart human effort. Hence it is necessary, for the progress of culture, that chance be conquered, in nature in the first place; but in law, too, its conquest is a phenomenon peculiar to culture, in this: that although the loss of values brought about by chance cannot be averted, yet it can be altered according to special principles and distributed in such a way that its effect is neutralized.

2. To the illogical elements must be reckoned first distance in time and space. The advance of culture seeks to overcome space and time: the limitations of the former, by making it possible for persons to come together with no regard for the obstacles that space interposes. So, too, should time be overcome, but in this direction little success can be achieved, for time is much more relentless towards human power than is space. Yet even in this respect, the legal order has been able, where natural forces have failed, to effect an equivalent by regarding future possessions as already legally in existence, and thus making them objects of commerce. In former times, it was considered sinful and presumptuous to meddle in the realm of the future; but humanity has

outgrown such a belief, and by bringing matters of the future into the affairs of today, not only have a large number of new institutions been created, but also a great many advantages have been obtained, and the nations of the world have been enriched.

3. Illogical elements are also seen in the influence of the nature that surrounds us. The development of culture, and hence also of law, is largely conditioned by external circumstances, above all by the character of the country where people live and by their environment. Whether they live on the plains, or in the mountains, near rivers, or near the sea, is of determinative importance for the advance of culture; and equally whether they live in fertile, or in barren lands, for on this depends whether their products will be plentiful or scanty. Above all, however, the character of the land occupied exerts a vast influence on the possibility, facility, and quickness of social and commercial intercourse. The sea, especially, has been of decisive importance to those peoples that used it for the development of trade and thus gained those material and intellectual advantages that are connected with commerce.

It has even been asserted, that the whole variation in the history of mankind can be traced back to these natural foundations, but this statement is a great exaggeration.

It is possible to overcome these factors only in part; and, indeed, effort should be directed to this end only in so far as elements that hamper culture are concerned; for instance, by making commerce difficult, or by facilitating sudden attacks. The surmounting of these difficulties seldom lies within the province of the law, but is accomplished rather by other cultural measures, so that we need not concern ourselves further with them here.

4. The chance of life is another illogical element. We cannot remove it from the world, but we can try to

render it more or less harmless. It is a foreign element in evolution and should lie in our power to such an extent that we can remove it where it injures us, and retain it only where it is useful, or at least neutral.

Operations of the legal order that aim at neutralizing chance are innumerable. They are particularly popular today, and our whole life is encompassed by insurance agreements which are intended to distribute the dangers that meet the individual, over society at large, and in this way to dull their edge. Also, in other respects, there is much in our legal life that aims at adjustment. This always takes the form of removing the consequences of chance for the sake of an improved situation of the whole. To this kind of activity belong especially all those institutions that seek by legal means to restrict unjustified enrichment, and to bring about regulation that corresponds to cultural values.

Such institutions were long ago known to maritime law, where, by means of the legal device of the general average, a distribution of the losses among all those involved was accomplished; and today bankruptcy has a similar object in which the chance of quicker or slower legal action is not decisive, effort rather being directed towards equalizing the position of all the creditors.

5. Finally, to the illogical elements belongs the necessity — due to the incompleteness of human understanding — of sharp definitions and easily recognized boundaries. The law cannot follow all the fine points that arise in the logical development of the requirements of culture; for the law is made for men and for human intercourse, and must therefore be practically suited to such intercourse. Hence, it must not consist, for instance, of pure gold, but must be so constituted that it can be used in intercourse among men, who, for the most part, know the law only in the rough. Even

he who knows the law intimately will often encounter great difficulties in judging, because the essential conditions are known to him only in part, and because he lacks the means of entering more deeply into the actual circumstances. A system of law that always involves the minutest detail could not be of service to mankind, because it could never be realized; and a system of law that cannot be put into actual practice is contrary to the demands of culture. Hence, in this respect, culture must cut into its own flesh, and do without the realization of certain requirements in order to accomplish all that is humanly possible. Here, too, the principle applies that the art of living consists in choosing the lesser evil.

It follows, that the law will create a series of institutions which will meet demands only by and large, but which are so constituted that they are comprehensible to the average man. What is lost in detail and harmony will then be completely balanced by the fact that the law sets certain definite limitations.

(*a*) Statutes of limitation and rights acquired by long possession are based on the fundamental idea that time has a certain effect on human conditions, not, of course, time in itself, but the many processes of culture that take place in time; so that, after the lapse of some time, the law must undergo alterations, if it is to correspond to the new conditions that cultural processes have produced. But the moment when this should be undertaken is properly to be determined in each individual case, according to all the peculiarities of the system of law, in every period, and in every situation. It is, however, very difficult to determine such a matter in an individual case, and the result would be endless uncertainty that would have to be removed by intricate juristic inquiry. That is not feasible,

and hence: the law sets a certain period in the rough, on the assumption that it will correspond fairly well to the regular course of events; and thus it results that, though in individual cases the measure may be greater or less, an average or standard is established which is of benefit in all cases. For this reason, too, it follows that rights in things of intellectual creation [such as patents of invention] must lapse and disappear after a time, because such things are intended for the whole of soci ty, and must serve humanity at large; wherefore they can be withdrawn from it only for a time, that is, for the period in which they have not yet become a universal cultural possession. In this instance, too, it is a question of the individual case when this change has taken place, but, none the less, the action of the law in establishing a fixed standard is beneficial.

(*b*) To the same group belong all those cases in which the law allots a certain consequence to publicity, so that what appears publicly in a definite manner is binding as against everyone, whereas otherwise it is not recognized at all or only to a limited extent. Therefore we have public books, public registers, public notices and announcements; and what conforms to them is accepted more or less as legal and binding; for, in this manner, business activities are provided with security. Thence, also, arise those cases, where one result is produced when one acts in accordance with a public record, ignorant of the reality, and another result follows, when he is cognizant of the reality.

Here, too, belongs the legal treatment of the purchase of movable goods under conditions that justify everyone in believing the property to be that of the seller; as, for instance, purchases made in the market, in public places of sale, etc., where it may be assumed

that the dealings are honest and that publicity excludes all underhand methods and tricks.[1]

This incompleteness of knowledge can be partly overcome with better resources of getting information; the law may restore a right after the expiration of the limitation term, or it may declare that the party claiming the benefit of the limitation term must not take advantage of the expired term if he has acted deceitfully or dishonestly in regard to it. An example is seen in the treatment of the five-year term in the action of nullity in patent law.

6. Half way between the logical and the illogical and uniting them, in that both psychic life and the facts of nature are subject to the same power, stands the principle of causality. It applies in law inasmuch as:

(*a*) The phenomena of law succeed one another according to certain laws of causation, from which it also follows that time finds its application; for causation without time is unthinkable, and that again leads to what I have called the illogical element in the law; for time, as we have seen above, is something that lies outside of our logic, that forces itself upon our minds from without, and this is shown just in its relation to causation. For this reason, if anyone disposes of a thing in two ways, the first must precede the second; and if, as in the Mahabbarata, the prince first pretends himself to be a slave, and then enslaves his wife, the latter act cannot hold; because, after once having become a slave himself, he is no longer in a position to dispose of his wife. Not so, however, if the latter act had preceded the former by a few seconds: a fortune may hang on a couple of moments. If two persons who are related to each other die at the same time, a minute's difference may decide the fate of millions.

[1] Compare the further explanation in the chapter on the technic of the law.

(*b*) The principle of causality applies also to this extent that the operations of the human mind follow the law of causation when the free will does not intervene; that is, when the effect on the mind of others conforms to the ordinary principle of sufficient cause.

(*c*) Causation also comes under consideration in as far as activity in the external world is of importance to the law. In private law this is not so much the case; for there action is, in the main, a declaration of will, thus having a logical and mental basis. But there are also instances where external facts enter into consideration; thus, when one man aids another, but especially, in illegal acts. Criminal law, however, is preeminently the province in which causation is important, for a person is responsible for a result with which he is connected according to the laws of causation. One fact, however, is frequently overlooked. One may be connected with a result not only as its cause, but also by fixing the condition by means of which the cause takes effect. Presupposing that this has been done in a guilty way, for one has not actually given rise to the cause thereby but has made it effective and removed the obstacles, this does not indeed suffice to stamp the one who performs the deed as the one who causes it, but it is enough to make him accountable for the revealed causation; for it is right that a man should be responsible for his wrong, even though he use only natural causation for his own ends. This makes it appear as if the distinction between cause and condition might be omitted altogether, as in criminal law generally, only the guilty deed comes under consideration; but in criminal law, as well as in unlawful acts in civil law, there are cases in which a man's liability is not only for the wrong, but for the result. In such cases only the causation comes under consideration; for it is

proper that when a man is liable beyond his wrong, this responsibility should be confined to the realm of the strictly causal.

As to the rest, the distinction between cause and condition is what I have already made clear: the condition has to do only with being or non-being, causation with the way and manner of the result, and this rests on the fact that it is the cause that operates. The view that there is nothing operative, but only a sequence from one to the other, so that is is impossible to distinguish between cause and condition, cuts away the ground from under the whole conception of causes, and contradicts the fundamental principle of our theory of perception, according to which the categories of our mind correspond to categories in the external world, the category of causation no less than the category of time and space. I have already given a fuller explanation elsewhere and can refer to that.

The following, however, is essential: it is possible to trace back the concept of causation more or less, for there is always a chain of cause-momenta in which one link joins the next. Which of these links is to be regarded as the determinative one depends upon the way we look at it. The physicist will fix upon one, the jurist on another. The latter will naturally trace everything back to the man who, acting in accordance with or in opposition to the law, is accountable for the consequences. All things that lie between the man and the consequence are the links of the chain; what lies before the man is, according to the juridical view, very rarely of importance, at the most only in as far as it serves to characterize, juridically or morally, the conduct of the human personality. If, for instance, someone throws a firebrand into a barrel of gunpowder, the juridically momentous cause is the throwing of the firebrand; the physicist,

on the contrary, considers the natural processes that lead to the explosion. The psychologist may be concerned with the feelings and emotions that preceded the act; they are of importance to the jurist only in as far as they aid him in justly fixing the degree of guilt. But if a juristic act is involved, the law has nothing to do with what preceded it; the moving factors in acts with which the law is concerned are ordinarily without importance.

SECTION IV

EVOLUTION AND PSYCHIC LIFE

1. *General Remarks*

1. The culture of an age is connected with the soul and the spirit of the people. To fathom them is the task of folk-psychology which, it must be admitted, still needs to be greatly developed. It is certain that, just as in an individual, different moods follow one another owing to psychic necessity, and owing also to laws that are as yet partly unknown, the same process goes on in nations. This is shown too by what is said below of pathological conditions, but even when the mental equilibrium is maintained, the most extraordinary psychic conditions of excitement appear which influence culture as a whole and thus also the sphere of law.

2. Such psychic conditions are:

(*a*) Religious fanaticism, which leads to an undervaluation of material things and to a congregationism (*Kongregationismus*) and communism based on complete severance from all earthly endeavors. These moods rest on the predominance of religious emotional life in which religious conceptions, and especially the belief in a herafter, play a large part.

(*b*) Following a period of pronounced egoism there frequently comes an altruistic reaction when people devote themselves to the welfare of others, found society after society, league after league, and seek not only to raise up the man who is less favorably situated, but actually to indulge him.

(*c*) There are periods in which the inner life of men is entirely devoted to feelings and emotions and in consequence their power of resolution becomes paralyzed, and the life that finds expression in deeds is almost completely suppressed; there are times when hatred and revenge grow numb, but this situation is balanced by the loss in initiative and power of resistance. Those are the days of sentiment and sentimentality. An excellent example is the latter half of the eighteenth century in which sympathy for criminals, for example, infanticides etc., was common. Such impulses have appeared in our day, from time to time, but not to the same extent; for it is a peculiarity in the development of nations, that when certain moods have once dominated a people they may indeed occur again spasmodically, but rarely control a whole period a second time.

(*d*) There are times when critical reasoning outweighs all else, when people seek to get to the bottom of everything, will not accept the authority of the past, and question every institution as to its usefulness. These periods are frequently destructive, for many things are rooted in the nature of man without it being possible for our reason to trace them back to their fundamental ideas; and, besides, the connection with the past in itself is important in order that culture may not be shallowly built on sand; for only when founded on history can it take form and shape. This, however, is often overlooked and people try to reject whatever reason cannot explain.

The chief example of such a time is the period of enlightenment (*Aufklärung*) at the end of the eighteenth century which had an immeasurably clarifying effect as regards the historical.

But, on the other hand, such periods are necessary, because frequently historical fragments remain that must be removed before development can go on. To be sure, such things die of themselves, as soon as the nation is strong enough, but theirs is often a very slow death; and antiquated institutions often droop and vegetate a long time without finding justification for their existence in the needs of evolution. Hence, it is well if now and then a merciless hand cuts them down.

3. It is easy to understand how the law is influenced in all these respects. Since we cannot get on without earthly possessions, congregational and communal life leads to an over development of communal ownership, and property in *mortua manu*, and all kinds of endowments and testamentary dispositions will thrive under it. The increase of altruistic societies leads to undertakings in the interests of third persons, to the raising up of special social officials, and to further elaboration of the law in its relation to such societies. Whenever an institution gains in importance and appears in a dominant form, a great variety of new questions arise and many complications appear in new guise. Sentimentality made itself felt, however, especially in criminal law and led to a complete remodeling of the penal system. Finally, the effect of the "clearing up" periods is usually a critical one throughout the whole sphere of law, and wherever such periods find antiquated ideas they actively oppose them. This may, of course, also happen in the realm of criminal law, for there ancient abuses are especially prominent. Especially in the enlightenment period of the eighteenth century, sentimentality and enlightenment combined

with each other in a curious fashion. The former aroused a strong feeling of dissatisfaction with what existed, the latter grasped the defects of its logical foundation, and in this way they advanced together against the past.

4. Psychic life may give rise to pathological conditions. There are aberrations in the development of culture, necessary aberrations. Conditions often are produced which do not harmonize with cultural problems and which cannot be said to be justified and appropriate from their standpoint. The development of culture must proceed through the human soul: this is a point that has received altogether too little attention. And the folk-soul is like the individual soul: it develops rhythmically, it needs its aberrations, its mad pranks, its irritabilities, it cannot always keep on the straight path. Humanity becomes surfeited, overtired, and turns to certain things that are directly opposed to evolution, hence also to culture. Not till hecatombs have been sacrificed to the god of nonsense is humanity satisfied and ready to turn again to reason. Just as it is necessary in art that, from time to time, pathological conditions arise when men rush into all possible uglinesses, confusions, pettinesses, and produce things that are a mockery of all artistic feeling, not only in the opinion of a certain age, but of all ages; so, too, in the development of the law there are periods of frightful confusion and crass senselessness. The persecution of witches, the misuse of torture, are conceivable only as the expression of human savagery and craziness. The duel without a religious background can only be traced back to misguided caste feeling; terrible fury directed against foreigners, and much else, is of the same nature. The exaggeration of justified endeavors becomes almost blameless, when religious fervor leads to persecution, the love

of liberty to revolutions, the desire for order to reactions, and when, by these things, onslaughts are made on mankind.

When the history of the law considers these things it must regard them as pathological conditions that appear at times when necessary disease takes hold of humanity; so that only after it has been shaken by fever can recovery begin, and the refreshed mind be ready for new achievements.

The law, too, has felt this keenly; for it is just the jurists who have been not only the supporters of human progress, but also the ringleaders in human follies and mad pranks. In witch trials, tortures, revolutions, and reactions, jurists and the law have always taken a principal part; and the banner of the law has led mankind on to its wildest orgies and most cruel persecutions.

The impulses of development that sway humanity must pass through human psychic life, and only in this way can they attain what the human soul is capable of accomplishing. But this soul must, from time to time, grow ill, that it may grow well again. Whoever does not look at the history of law from this side cannot be just to it, and either will have to leave these human errings uncomprehended, or impute a false meaning to them. Both courses prevent the comprehension of the world's development. In this respect almost nothing has been accomplished with the history of law until now, because it has been treated with a total lack of philosophy.

5. The Philosophy of Law, too, must take these moods of culture into consideration as necessary expressions of the folk-soul; it must recognize that without them humanity cannot develop; for just as the individual develops only according to the principles of psychic life (and as this psychic life, rooted in the whole nervous system of the man, must have certain twists) so is it too

in the life of peoples; and the philosopher of law must not simply pass such occurrences by. However excessive they may be, he must grasp them as necessary to the development of history, bearing in mind the fact that Hegel's idea of a perfect logic in evolution is erroneous and will not bear the nearer scrutiny of history.

Nevertheless, the far-sighted legislator can mitigate much here; even if the whole mood must be struggled through to the end, yet the philosopher of life, in the life of nations as in the individual's life, can soften the pathological tendencies and help out in one way or another in order either to further the development or to ameliorate the pain and suffering that it involves.

That will be the correct attitude of the legislator if he is also a philosopher of law, and the tremendous practical importance of the Philosophy of Law lies in that it makes use of the great experiences of the past, and, at the same time, of philosophical knowledge of present world history.

6. The restraining element of psychic life is contained in that life itself. The latter is not so constituted, that what is obviously reasonable immediately triumphs; rather, what exists often continues to stand, and often reason gains the upper hand only after a long struggle. This is the principle of preservation corresponding to the principle of inertia in nature.

This principle, it is true, will often hinder evolution and hold humanity back; but, on the other hand, it is of great benefit in preventing evolutionary degeneration, and the mixing of what is salutary in appearance only with what is actually so in culture, which often does great harm to the whole. But, apart from this, it is advantageous to evolution, if a certain kernel is preserved as long as possible in order to keep the connection, to restrain excessive passion by the memory of

the ancients and our ancestors, and, especially, to keep alive the idea that the individual must obey existing laws whether he considers them reasonable or unreasonable. Moreover, this restraining kernel often produces strong cohesion among the people, and operates to stay tendencies favoring dismemberment.

This is the standpoint from which this cultural phenomenon must be regarded. We must know that preservation and holding fast are salutary in the history of humanity whether the old is good or not.

Sometimes, however, preservation is carried to the length of senselessness and throws back a people that will not adapt itself to new situations; and in this way a nation that has stood in the first rank becomes insignificant, and loses its self-consciousness and the power to produce culture.

7. In this connection, it is an old experience that religious life is more conservative than secular life. This is partly because the former is less rational than the latter; that is, it rests on certain rules that lie outside of the mind's perception and which, because this perception cannot reach them, are less influenced by the progress of intellectual activity. We do not believe because we consider faith rational, but because faith is something sacred, standing above humanity. A second reason is the veneration for the divine that lies in religious life, from which it follows that man does not trust himself to deviate from what is regarded as the divine will; for such a course would withdraw the grace of God from him, and give the powers of evil the opportunity to rule.

Hence, religious life is not only more conservative, but contains a number of reminiscent forms of eariler life. For this reason, it is extraordinarily instructive for us; more so, however, as history than as philosophy.

The traditions of a people cling with the greatest tenacity to religion, traditions often consisting of customs, the meanings of which have been completely forgotten, and which are based on ideas that have long since been forsaken. Such customs, like religious concepts, form a drag on cultural life which does indeed sometimes hinder progress because of its restraining power, but, on the other hand, because of the fulness of emotional life that it contains, and by its close connection with the past, affords protection against a too hasty culture of the mind and against a too rapid rush forward. For progress should always be made in such a way that the fruitful seeds of what is passing are retained. This is what is valid in the logical dialectics of the world-process which Hegel has described to us in such a seductive way.

8. Another peculiarity is that a people, while forsaking old customs, still often retains their symbolism or perpetuates fragments of them.

This is also of importance in the history of culture, for in this way something is conceded to the demands of conservatism, and in addition, it is still made possible for the gates of progress to open. These fragments are not simply meaningless ruins with merely an antiquarian interest attached to them; they are, as it were, a sop thrown to antiquity in order to induce it to retire from the field.

2. *The Psychic Disposition*

1. Race combines with inherited qualities and talents a certain prejudice and a certain innate purposefulness bred by long practice, and is therefore especially fitted to develop culture in its own way. Hence, the course of culture will be conditioned mainly by the race, to which must be added, of course, the surrounding world,

and the nature of the locality in which the race is active, as was explained on page 24.

2. In addition, the historical development of the race especially comes under consideration and all the events that influenced its life; in particular, whether it was able to spread out over wide territory, whether its development was hampered by surrounding peoples, whether it produced forceful men that prevented the quiet unfolding of its nature, and many other points. In the multifariousness of these influences lies the charm of historical research.

3. In speaking of primitive peoples, the term should not be used to mean peoples without any civilization whatever. There are no such nations. If we consider even their languages alone, we see that races which we are accustomed to assign to the very lowest plane, like the Australian savage for instance, must have a culture of centuries behind them. For such languages with all their niceties of speech, with their forms expressing the most remarkable logic, can only be the result of a development that has continued for thousands of years. And this also applies to their religious views, which are often developed down to the minutest detail, and are based on concepts that it takes centuries to produce.

Consequently, when we speak of primitive peoples, we can only mean those peoples that have not attained to the forms of culture that correspond to our own, as, for instance, to a written language, to a complicated national life, above all to the political economy that agrees with our views.

The impulse for a regulated industrial life is often lacking, or is only very gradually developed, according to the nature of the people. If they have no inclination for it they accumulate nothing but enjoy what they have; indeed, some religions discountenance

keeping anything, as it might attract the evil spirits, etc. Hence, when they have anything to enjoy, they have a superfluity — when they have nothing they suffer. (Compare p. 54.)

It follows that such people never acquire much wealth.

3. *Psychic Impulses*

1. The mainsprings of human culture are always the mental capacities of man, the activity of which vitalizes the history of the world. They are the wheels in the vast mechanism of history, and include not only the qualities that appear in humanity as a whole, but also those that are felt in the life of the individual. First come religious concepts, the consciousness of dependence, the instinctive sense of the interrelation between man and nature, and the idea that tremendous spiritual powers permeate both nature and mankind. This belief is bound up with our human nature, and follows us from the beginning of time up into the highest circles of culture. Totemism, the worship of ancestors, the ever-present adoration of this or that being, the belief in certain divinities — all these permeate human life and lead to innumerable institutions of civilization. Agriculture, marriage, chieftainry, the State, law and justice, all stand under the influence of high and the highest powers; even family unity is held together by this belief: what man thinks and feels becomes religious; it is brought into connection with those great concepts that control life.

2. The notion that human culture is controlled solely by the instinctive desire for food and sexual life is one of the monstrous errors of a bygone dilettanteism, a dilettanteism that was unjustifiable even fifty years ago; for it was already possible at that time to understand the life of peoples better if more study had been devoted to it.

3. It is true, nevertheless, that the instinct for food plays a large part, and has produced a good share of existing human institutions. All of what we call material culture is closely connected with it; and if we think of such institutions as the ownership of things and the ownership of natural products, we can form an idea of the incisive influence that all this exercises on our life.

4. But, in itself, the instinct for food is brutal; it takes what it can get with no regard for how it is obtained, for man is omnivorous and consumes everything, even his fellow man. Sometimes the instinct breaks out with tremendous power; sometimes man goes hungry, if he can obtain nothing. This state of things does not change until the instinct for food is ennobled by becoming the instinct for wealth, and a certain system and order enter into the acquisition of material goods; then man makes use of nature not only with violence but with deliberation. (p. 54.)

5. So, too, the sexual life of man arises from one of the most powerful instincts, and the desire for sexual gratification has produced a variety of institutions. Marriage, of course, is closely connected with sexual instinct; but, also, all the forms of sexual commerce outside marriage, and, especially, those originating in temple cults, have been called into being by man's tremendous erotic force.

6. The foregoing remarks show that we should take a very one-sided view, if we regarded hunger and love as the sole propelling forces of human existence. Still other psychic forces appear, chief among which is the love of domination which is inherent, if not in all, at least in the majority of human beings. The desire to be obeyed, the enjoyable consciousness of compelling others to service, acts as an incentive, and

produces many institutions and world-renowned deeds. Chieftainry, and the dominion of kings, are largely rooted in this quality, and it has been the cause of numberless revolutions, wars, and violent upheavals. In effect, it often destroys, yet as often constructs and civilizes.

The passion for vengeance is closely related to self-assertion; for revenge is based on the feeling that one has been humiliated by another, and thus injured in one's love of domination. Later, this revenge gives way to national criminal law, but for a long time it represented justice. Cruelty also is allied to this love of domination, but it contains an additional psychic element, pleasure in inflicting not only humiliation but pain on another; and this instinct of cruelty has entered into the feeling of revenge, as well, besides, giving rise to other human institutions and historic deeds.

7. The tie that connects egoistic and social instinct is family instinct, which consists of the need felt by an individual of maintaining a connection between himself and others that are near to him. The feeling for family coherence is independent, connected, indeed, with other elements in emotional life, but not conditioned alone by them. It, too, is a tremendous factor in the development of human life. It causes families to cling together with enduring tenacity, even after the religious tie has ceased to be; and it creates in the individual the strong impulse to work and suffer for the members of his family.

8. To these are added still other principles of a more refined nature: the desire for knowledge, the artistic and technical creative impulse that obsesses thousands and thousands with demoniacal strength, and moves them to discard and reject everything else; and finally

the impulse of sympathy that at first is of the nerves and sensual, but later is intellectualized, and which causes the individual to devote his life to the good of others, even to sacrifice himself for the whole. True, it is not correct to see in those so-called "altruistic" acts a complete contrast to egoism, for it cannot be denied that the desire to help others rests on the effort to satisfy one's own inward needs, and hence is beneficial to ourselves. On the other hand, we must not overlook that it is just this egoism which, through the medium of sympathy, leads to self-renunciation and activity for others. It is only the dialectic inversion that changes the idea into its opposite.

9. All these instincts and impulses in man incite him unceasingly to action, spur him on to new achievements: men build and destroy; often the individual digs into the flesh of the community, while the community in turn annihilates the individual. This is the Calvary of mankind, where the spirit of universal history suffers every moment and dies, to come forth with new radiance from the tomb.

These forces, out of which culture has proceeded, have also shaped the law and established it; and, again, the law has reacted on these forces in a thousand ways, protecting these instincts in some directions, moderating and weakening them in others; and all this is a part of the task it has to perform. In the development of human culture the law is a strengthening as well as a restraining factor.

SECTION V

MANNER OF DEVELOPMENT

1. *Collectivity and Individualization*

1. Development consists of an advance that does not take place simultaneously and equally at all points but with much variation and unevenness, during which process culture assumes an increasingly important form.

2. Humanity is destined to a deep knowledge of the world and of the supermundane. It is destined to form and to rule, to form in the sphere of art, to rule over the earth; and, perhaps, by virtue of technical science, over further fields of the universe. The totality of humanity's achievements is called culture; and in this culture, it is the part of the law to promote and to vitalize, to create order and system, on the one hand; and, on the other, to uphold and further intellectual progress.

3. Two things are necessary to this end: in the first place, an intensive development of the individual, with the highest possible training of all the mental powers; and, in the second, steady cohesion in order that humanity may not fall apart into individuals, that in the strong tide that sets toward individualism the community may not lose its hold, an event that would be calamitous; for nothing great and whole can be attained except by the devoted, or at least successful, collective activity of individuals. The minds of men must on the one hand be developed to the utmost as individual intellects, and, on the other, all the results obtained by these intellects must be united in the great common temple of humanity; for only in this way can the collective intellect of the universe be effective. The collective

intellect of humanity is something entirely different from the sum total of individual intellects.

Thus humanity can operate only in collectivity; it is only the interchange of thoughts and feelings, the union of forces to one end, that makes it possible for mankind to develop culture and to achieve the great deeds that constitute history. The assertion that it is always individual persons that mould events is considerably exaggerated. It is true that forceful minds have in many cases pushed culture forward, often in the face of strong opposition on the part of others; but they were able to do so only by imbuing larger or smaller communities with their own ideas and galvanizing them with their own aspirations.

4. Hence, it follows, as a matter of course, that the history of the world had to begin with communities (collectivism); if for no other reason, than because, in former times, the enemies of man were so many that only strong cohesion could overcome the dangers that threatened him.

In later culture, we see the individual gradually emerging from the community and leading an independent intellectual life, thus producing extraordinary variety and multifariousness in the life of the nations. But this individualization must never lead to the destruction of the social tie, and may dominate humanity only in certain directions. Humanity must always find a way to use individualism as a stepping stone to new social creations. Even though it be possible for the individual to live his own life and develop his own personality, yet he must always resort to intercourse with others, in order that the whole may benefit by the results of his activity and thought.

5. Hence, it is the endeavor of cultural life, even in periods of individualization, to create institutions that

will pave the way for this collective activity of the individual and the community. To these belong, in the first place, all associations, especially those called juristic persons; here, too, are to be reckoned all the expressions of personality; for this expression lies in the constant contact of the individual with his fellows which causes the activity and the passivity of the one to affect the whole, so that the latter participates in the personality of the individual. The law of obligations, with all its ramifications, especially operates in this way, and in particular the obligation which has its origin in the partnership relation. The contract is the special instrument by which individuals achieve their interests with a social effect. In this way connections are established between the individual and the communal life of mankind, and just as this occurs in the intercourse of individuals, so, too, it results in the affairs between nation and nation.

This constant alternation between collectivism and individualism is the principal lever of cultural life. The individual should develop independently but the tremendous advantage of collectivism should not therefore be lost.

6. Hence the course of humanity's development from the beginning has been this: first, mankind acts in groups, the individual is absorbed in the group; the law is the law of the group, not of the individual; the group is the guiding power; labors and amusements are shared in common; and it is not the individual that thinks, but the group. Hence institutions are produced, like group-marriage, communal property, and common labor. In this way, mankind can resist its enemies and wring enough out of nature to preserve what it already has with the scantiest development of cultural means.

To what extent the individual is absorbed in the group is shown by the fact that to be thrust out of the community is the worst evil that can befall a man. Thenceforward he is a nonentity and destined to destruction. Yet, it does sometimes occur that such individuals maintain themselves, and then, if more are cut off from the community, groups of these exiles are formed that continue to exist outside of the chief race or tribe.

The dependence of the individual is shown further by the religious unity of the community; for this unification is due mainly to the idea that all the members of the tribe are protected by the same spirit, and the world of spirits is taken at first, of course, not from the realm of fantasy but from that of reality. The spirits are animals, and the spiritized tribes are animal tribes and bear in themselves the animal nature. Later, this gives place to the cult of creatures of the imagination which originate in the dreams and hallucinations of men, and to ancestor worship. A plurality of clans is thus held together by the custom of group marriage, and in this way the legal order aids in firmly establishing and cementing the different tribes.

Like marriage, all gain is common; no man works for himself, but each for a larger or smaller community.

7. When, in this way, mankind has grown to a certain measure of strength, when it begins to cultivate nature and turn its attention to agriculture and cattle raising, everything is still held in common for a long time, but yet, individualization in the family and individualization in wealth begin to be slightly developed. This is increased by the necessity that the tribe separate and seek the means of subsistence in smaller groups. Thus, gradually, tribalism is displaced, and instead of the community, we find the individual family, monogamy, and family property; and, in that the individual

enjoys the fruits of his own labor, communalistic sentiment changes into individualistic feeling, which is one of the greatest forces that inspires human effort and directs it upwards. Each man tries to excel his neighbor, and this leads to an abundance of achievements and a plenitude of new cultural values.

8. Here, too, however, evolution exerts a cohesive pressure; for the more intense individual development is, the more multifarious it becomes; and the more the individual limits himself to a certain field, the more necessary it is for him to associate with others. Thus individualism must strive again toward collectivism. Problems arise that can be solved only by common effort. The family is no longer able completely to fulfill the duties of training and education, individual rights must be protected by special means, and, above all, it is no longer possible to leave each individual to provide these means himself: the State must intervene as a protecting power and whereas formerly each individual shifted for himself, the activity of the State now interposes. The achievement of a State procedure, a State criminal law, is accomplished; and, from henceforth, even those institutions in which individualism is most pronounced, like marriage, require the aid and supervision of the State.

Thus, we see that the powers that individualize humanity lead it again to collectivism, and where collective labor formerly went on with the steady rhythm of a pendulum, individual effort now comes into play; henceforth, personal activity becomes the rule, and this again leads to a reconciliation between the individual and the community.

9. Although, even before this, the law was powerfully effective, its effectiveness is now increased, for the expression of personality requires legal regulation, the

various activities of individuals must conform to certain principles, without which such activities could not exist. And so, again, the law is the magic by means of which society as a whole is held together, like the threads in a closely woven fabric.

And just as exercise of liberties and powers binds individuals together, so, too, do international activities bind nations; and so, once more, we have the same contradiction between the individual and the collectivity, and the same reconciliation brought about by the attitudes of personality and the laws that govern it.

10. Thus the history of humanity shows a constant tendency toward individualization, and again an unceasing pressure toward collectivism; the development of legal principles corresponds to both these movements, immeasurably increasing the forces of the individual, on the one hand, and, on the other, promoting unity so that the achievements and the activity of the individual may benefit mankind.

2. *The Culture of Wealth in Particular*

1. Higher civilization can only be attained if a nation feels an instinctive desire for property, leading it to accumulate wealth and bring it into use. In this way alone can a people reach a thoroughly rational activity, and men be spurred on to make new discoveries and conquer nature: it is the desire for wealth that rouses and intensifies this side of human culture.

2. But, also, the pursuit of knowledge is greatly heightened by the desire for wealth. The necessity of visiting foreign territory to dispose of wares, of learning to know other countries, of associating with other peoples much promotes the cultural growth of a nation, for trade binds together and involves an exchange not only of goods but also of manners and customs, laws, and other cultural values.

3. And, in still another direction, the movement is accelerated, for invention and discovery are closely related. Inventive activity leads to discoveries, and these in turn support invention, so that knowledge is much advanced.

4. This does not mean, however, that all spheres of the human mind are related to trade, for the Hindoos, for instance, would hardly have become such great philosophers if they had not early withdrawn from commercial pursuits; and the monkish learning of the Middle Ages with its philosophical, theological, and historical tendencies moved in entirely different channels.

Yet, even here, gainful occupations were involved to the extent that ecclesiastical communities and monasteries presupposed an industrious population that earned enough to make it possible for aspiring minds to devote themselves entirely to science.

5. In another direction, too, the pursuit of wealth is of importance to a people: a nation's power to acquire wealth gives it the upper hand in international quarrels.

It must be admitted that this is true only within certain limits, because the possession of wealth, especially if it be badly distributed, may have an enervating effect. Yet, this is partly removed if the desire for wealth is very strong, and what has already been acquired does not satisfy the individual but spurs him on to new efforts.

6. The desire for wealth is not innate in the human race. It requires external factors to urge man to accumulate and to engage in regular gainful activity, and among these factors two are especially important: first, the temporary lack of subsistence which necessitates laying by something for the future as an alternative to starvation; and, secondly, agriculture, which has the peculiarity of bringing in all its returns at one time after

a longer or shorter period of labor. It follows that at harvest time something must be stored up for the ensuing months.

When, in this way, regular activity is developed, the desire to accumulate arises, and when a nation has even an incomplete grasp of economic principles the pursuit of wealth will grow to greater dimensions, and a law of property relations follows of itself.

7. As soon as the desire for wealth becomes active in man, what is called capital makes its appearance. Under capital, which is rather an economic than a juridical term, is understood an accumulation of the produce of industry which is not intended to be consumed, at least, which is not at once consumed, but is kept either for later consumption or to serve for further production. Only a nation that accumulates capital can rise above the vicissitudes of life to consistent and permanent activity, and only such can attain to extensive production. For the latter always presupposes the existence of capital for production, and sufficient supplies to allow for time devoted to some particular activity.

8. Agriculture, or rather the cultivation of the soil, is one of the essentials to higher culture; it leads to a settled life and makes it possible for larger numbers of people to live in a limited territory; and it alone guides man to a sense of wealth, and to the accumulation of capital. It sets him free to a greater or less extent from the chances involved in procuring the produce of industry and enables him to lead a regular life.

On the other hand, it presupposes certain special qualities; especially, it requires a man to devote himself to regular manual labor and, to a certain degree, to subdue his passions. It also needs a certain amount of skill and, above all, the firm self-control that drives a man to work even when he is little inclined to do so.

Not all the intellectually important nations have developed these qualities, and where they have failed to do so, and in consequence have not turned to agriculture, they have never been able to rise above a certain state of culture. Their accumulation of wealth and capital has never been sufficient to allow them to obtain all those advantages that accrue from a well-developed and active desire for wealth.

CHAPTER III

SECTION VI

CULTURE AND LAW

1. The requirements of the law are the requirements of culture. The law must be so constituted that it may in the greatest degree conform with culture. It must aid in developing the seeds of culture and in repressing the elements that are contrary to it. But it must be borne in mind, that the course of culture is often not direct, that it reaches its goal by a roundabout way, and that not infrequently it has to advance through a long, uncultured period. But even such an age demands its system of law. It will naturally desire a code that as far as possible is in accordance with its own uncultured state; while, on the other side, a higher comprehension of the law aims at so ordering matters that periods opposed to culture are shortened as much as possible, that antagonistic tendencies are weakened, and that thus the normal condition of progress is more quickly re-established.

This often leads to a schism in legal tendencies between the masses, on one hand, struggling for a legal system that will correspond to their own uncultured state, and, in opposition, far-sighted minds trying to bring about a change. To realize this we need only recall the offering of human sacrifices, the persecution of witches, and note, in our own day, the custom of dueling, still regarded by some people as indispensable. (p. 39.) These are the times when the law-giving spirit that stands above the people is especially called upon to

wrestle with the popular mind, and to diminish its illogical efforts.

2. The requirements of the law are evoked by the needs of material and intellectual culture. Both should be regulated and promoted by the law. At the same time, material and intellectual culture must not be sharply separated but must stand in close relation to each other. Material culture must not stray into paths where the mind cannot follow it, where it would grow unreasonable and offend against the principles of moral life in particular; for lack of morality is lack of reason. In considering these momenta, recognition of the proper requirements of the law is called into play, and further, the art of suitably meeting these requirements with new legal constructions and reforms.

3. Fulfillment of legal necessities is the mission of the legal order. The latter, like all the elements of culture, appears in naïve unconsciousness; indeed, originally, it does not appear at all, being enveloped in the whole mass of cultural tendencies: law, customs, manners, religion, all form one unity which arises from the comprehensive activity of the many who, sometimes following a standard, sometimes deviating from it, in numberless details realize the impulse to fulfill the inner necessities of the law. (Compare p. 86.)

4. Law is the standard of conduct which, in consequence of the inner impulse that urges men toward a reasonable form of life, emanates from the whole, and is forced upon the individual. It is distinguished from morals, customs, and religion as soon as the point is reached at which compulsory standards are separated from those commands that involve merely social amenity, not the possibility of remaining unchallenged in society.

5. In the course of development, the legal order appears more and more as an order of rights, that is to

say, a distribution among mankind of the advantages of life; and one of the important functions of the legal order is to protect these rights.[1] Yet this is not its sole task. It is also the guardian of cultural values that are not distributed among mankind but which must be preserved for all humanity, at least for the whole nation, to insure a prosperous development and to promote cultural endeavors.[2]

6. Finally, it is the function of the legal order to secure and increase the progress of culture by so moulding rights and the universal cultural values which it protects that the hampering elements are removed and the upward tendencies are supported and strengthened. This is brought about especially by the manner in which personality gains its forms of expression. The cultural forms of expression (*Verkehr*) which are developed through the standards of law are called acts in the law (*Rechtsverkehr*), and a great many legal standards are standards of liberty and power.

7. Acts in the law (*Verkehr*) have the mission of so distributing material possessions that they will be of the greatest service and benefit to humanity. Hence such acts are a civilizing factor, and everything that supports them tends to promote culture. We cannot, it is true, expect those who are engaged in carrying on pecuniary transactions to serve humanity in this way. Such altruistic intentions would also be far too weak an impulse to invigorate human action. Egoism, too, one of the greatest propelling forces of mankind, is needed. Egoism in motion works wonders. It stimulates human activity, urges man on to constant effort, sharpens his

[1] This subject has been elsewhere dealt with. ("Lehrbuch des bürgerlichen Rechts," I, p. 46; "Einführung in die Rechtswissenschaft," p. 4.)

[2] This subject is more fully discussed in connection with the theory of legal technic, p. 66.

wits, and causes him to be unremitting in his search for new resources. Hence, the legal order could not do anything more foolish than seek to uproot or even to combat egoism; and it is therefore comprehensible that laws relating to human activity, especially commercial law, are based on this egoism; for one of the most essential processes in history is just this use of individual instincts to form the culture of the whole. The intention to benefit society may indeed be present as a very secondary consideration, but its importance is relatively slight.

Objectively, however, external life must be so adjusted that it serves the interests of culture; that is, it must tend at the same time to increase the quantity of the world's goods and to extend their usefulness. If trade moves in other directions than these, it is unfruitful, and may even have an injurious and corruptive influence. Thus it is, for instance, if commerce becomes simply gaming, so that no redistribution of material possessions is brought about, but merely one individual is made richer and the other poorer; that is, one loses what the other gains. In this way, gaming stands in contrast to speculation. If two merchants agree that, according to the state of the prices in the exchange, the one must pay the other, this is simply a game that brings about no actual movement of wares. But, if they agree that on a definite day the one is to deliver goods to the other at a certain price, the one does indeed become poorer and the other richer; but a transfer of wares has been accomplished, and this is part of the organic movement of commerce, the general practice of which invigorates culture, for commerce is composed of a multitude of separate movements and every separate movement or transaction operates as a part of the whole.

Speculation is a combination of transactions undertaken for the purpose of gaining profit from the whole.

A man tries to bring about a movement of goods that will also bring him personally an advantage, as, for instance, if one buys goods and sells them again; he hopes to sell them at a higher price than he paid for them. The combination of these two transactions, producing the profit that remains to the purchase, after he has resold the wares, and thus thrown them once more on the market, is speculation. The profit that he gains by this speculation is the result of his own effort, and is the reward for his activity, which is cultural in its effect, just because, by moving the wares, he has enriched commerce.

CHAPTER IV

SECTION VII

LEGAL ORDER AND PEACEABLE REGULATION

1. In addition to the legal order peaceable regulation is indispensable. It rests primarily on a religious basis and is therefore dependent on the religion that dominates society. This peaceable regulation is a necessity founded on the peculiar nature of our race, and, especially, on two qualities: our blind passionateness, and the incompleteness of our knowledge. If it were always possible to see clearly and surely into the existing state of the law, the members of the human race might more easily be allowed to seek and provide their own law, but the errors and ignorance of the mass and the difficulty of solving many legal problems make it impossible permanently to leave the exercise of the law to the individual; for, since legal views and legal interpretations are highly variable, the result would be collision of irreconcilable contradictions; and instead of a settlement we should have merely oppression, the victory of the stronger, without either the one or the other being obliged to declare himself legally defeated. But the blind passionatenesss of men frequently causes the efforts of justice to be clouded by injustice, and leads men to try to gain an advantage; that is, to gratify their animosities with no heed to the law.

2. Thus it happens, that even in cases where the law is as clear as day, its administration is difficult, and sometimes the debtor resists it with the greatest obstinacy; sometimes people claim the right to legal redress

entirely without justification. In such case legal processes become acts of violence, and under the cloak of justice injustice is done; the administration of justice becomes a pretense concealing acts of violence of the worst sort.

3. To this is added, in the course of time, inequality of position and means. One man is economically and socially strong, the other is not. One has an abundance of resources on his side, the other stands alone. In such cases, the evil consequences that arise from the human qualities mentioned above appear with double and triple force. The weaker man cannot maintain his right against the stronger, because the latter is able to give rein to his passionate animosity; and this might tempt him to do violence, under the cloak of justice, to the poor and weak that stand in his way. Owing to these human frailties, the legal order alone cannot suffice; peaceable regulation must be added. The purport of the latter is: the existing state of society with its interests must not be changed by arbitrary power, not even if the former is not in accordance with the law; if it is to be altered the change must be wrought by a higher authority, one from which a dispassionate examination of the matter and a deeper insight into the law may be expected.

This need of peaceable settlement has given rise to two institutions: first, possession in connection with the institutions of necessary defense for the protection of the person and of his interests (*Notwehr*); second, the means of realizing the law and settling disputes, that is, legal process (civil procedure).

Still another institution belonging to peaceable regulation is of importance for a long time in history, though later it loses something of its significance. This is the right of sanctuary, which checks kin-revenge, and in this

way leads to the State penal system. The extension of sanctuary is nothing else but the complete abatement of kin-revenge, and thus the echoes of the idea of sanctuary continue to be heard in later periods. While formerly kin-revenge was limited according to locality, time, and other circumstances, it is now entirely abolished; for every place, every time, and all circumstances are sanctuary, and resist its power.

CHAPTER V

THE TECHNIC OF THE LAW

SECTION VIII

1. RIGHTS AND THE CULTURAL ORDER

1. *General Remarks*

1. The technic of the law is part of the Philosophy of Law only in that it must be such as to accomplish the tasks required by the Philosophy of Law. Any legal technic that fails to produce on culture the effects that legal philosophy demands is a failure.

2. Legal technic must be so constructed that rights may exist, in such manner that a so-called legal subject (*Rechtssubjekt*) is the holder of the right, and that his interests are secured by law, and that he is provided with the possibility of using the object of his right as he wishes, thus exerting an influence on the cultural world.

3. But this alone is not enough, for also the general interests of mankind, which cannot be traced back to a single human individual, require to be upheld and promoted. In order thus to fulfill the requirements of culture, legal technic has developed in two directions:

(*a*) The law issues commands and prohibitions, the essence of which is not that the rights of the individual shall be preserved, but that the original interests of culture in general shall be promoted. Under this head belong the many regulations in respect to sanitation, to the promotion of morality in general, to the preservation of a certain state of the earth's surface (the supervision of rivers, conservation of forests, etc.). Here, too, belong

the manifold statutes that refer to education, social and economic conditions, etc. This is the field of cultural advancement through police and penal regulations. In connection with this stands the law of taboo.

Taboo in general means forbidden, and refers to everything that, for reasons based on mystical and religious grounds, is forbidden to the individual, the whole or a part of the people. Thus the conception grows out of primitive mysticism, but it has a strongly formative effect, for a great deal of what is necessary to human progress is accomplished by means of such prohibitions. We need only recall the great number of sanitary measures that could not have arisen except in this way. Of course, originally, the taboo was enveloped in a mass of so-called superstitions, that is, in a mass of ideas which, in one direction or another, gave expression to a principle of faith, only to die out later because they were merely of temporary significance, and disappeared in the light of more advanced knowledge.

In this way the custom of taboo could, to a great extent, take the place of our police regulations; for as soon as priesthood and chieftainry become more powerful, not only those things are tabooed that have hitherto been sacred, but the priests and chiefs have the right of putting others under taboo. If they do not exercise this right arbitrarily, but on rational grounds, the taboo becomes a beneficial means of removing the absurdities and indecencies of the people, and investing life with a certain dignity and sublimity.

(*b*) Another technical possibility is the creation of so-called juristic persons. The law may invest either an aggregate of men, or a unity of interests organized for the purpose of carrying out some definite aim, with legal subjectivity and give them the possibility of having rights and duties and undertaking legal acts. Through

this legal figure of the juristic person, the legal order obtains a lever which enables it to operate in all directions for its own ends, not only for a time, but permanently. And thus it gains the means of protecting animals, for instance, of which we shall have more to say shortly. (p. 69.)

The question whether the juristic person is real or imaginary should never have been seriously advanced. It is a reality in the law like every reality created by the law. It is not a human being of flesh and blood. Old and new absurdities that testify to the failure to comprehend this, need not be considered.

(*c*) Where the person oscillates between existence and non-existence, or when the interests of a future person are to be presently secured, a constructive legal subject is necessary, in order that the possibility may exist of having rights and holding possessions that serve this end, and in order that property may daily and hourly participate in the expressions of life, essential to its development. There are no rights without an owner, that is, rights that lack the subjective element; indeed the whole assumption of rights without an owner is at variance with the fundamental construction of our law, and at the same time with the permanent needs of the external world. For a constructive legal subject, a human organ is necessary; but there may be various organs: thus, if it is a question of the accumulation of wealth for a definite purpose, then the organ is the committee that collects it, and the person operates through this organ; if there is no such committee, or if it has ceased to be, a trustee must be appointed, who is then the organ of the person.

But, how is it, if property is devoted to certain purposes without the existence of a committee; as, for example, when feed baskets are put up for birds, wreaths laid on

graves, when provisions are stored in a mountain club-hut for the use of travelers? If there is any need that such things should have a representative, if, for instance, a person takes them away from the birds, the dead, or the mountaineer, then doubtless also an administrator must be appointed legally to prevent such acts.

A discussion of the many great and small errors that have been made in regard to this matter may be omitted.

Animals

1. Animals cannot be admitted into the world of culture as legal subjects, and a legal order that should assign to animals rights and powers could not be carried out. Animals themselves have no rights, that is to say, they stand outside the legal scheme; which is the more natural because our civilization cannot get on without a constant struggle against the animal world; and, as the promotion of culture is the whole purpose of our existence, there can be no objection to our developing our interests to the full as against the animal world.

2. But refusing to accord rights to animals does not mean that human culture can permit them to be ill-used. Refined culture is conscious of the presence on earth of other beings with feelings besides men, and therefore it regards it as mischievous, if these creatures are subjected to unnecessary torture. This, too, gives rise to the principle: suffering shall be inflicted on animals only when cultural ends absolutely require it. Our culture must be a culture of happiness to this extent, that all efforts that tend to reduce the state of happiness must be checked, unless the interests of culture demand them.

3. This justifies the law against cruelty to animals and all the institutions that are connected with it; also, especially, the principle that all measures pertaining to

the better treatment of animals should be promoted as far as possible.

4. In accordance with this principle, animals, it is true, can have no rights, but their interests are a proper object for foundations; the fund being the property of the juristic person, but the proceeds being directed toward benefiting the animals. Thus it is with the fund for swans (Hamburg); for the preservation of buffaloes (New York); the care of sick animals (India), etc.

Objects of Rights

1. Rights require a legal subject and a legal object. Legal objects may be things or persons. They may also be forces, connected with things, but yet controlled as something separate, like electricity for example. That it is much the same in respect to running water will be explained below. They also may consist of immaterial things; thus, ideas of all kinds, from which advantage may be derived in a certain way, and which therefore become objects in the realm of economics; hence, we speak of rights in immaterial things.

2. Rights in persons, again, may be rights in one's own body and rights in other persons. Peculiar to both is this: that the rights can only extend so far that the person still remains a person; that is to say, is still, at the same time, recognized and protected as a legal subject. This is fully dealt with in my "Einführung" and in my "Lehrbuch des bürgerlichen Rechts," and cannot be treated in detail here because we cannot do more than indicate the broad outlines of legal technic.

3. The totality of things to which a person is entitled is called property; hence, property may consist of material things, immaterial things, and also of persons in as far as they are affected by creditors' rights.

4. This totality, however, is not to be regarded as a

new proprietary whole, as if everything formed one single object, thus making a new legal object. To treat it in this way would be contrary to the rules of legal technic, and would make it a source of great uncertainties. If, for example, an object does not belong to me, but is treated as a part of my property, this might lead to the most inconsequent results and difficult conflicts.

5. But this does not prevent property, as the sum total of all proprietary objects, from having a certain significance, for,—

(*a*) The comprehensive term is of importance in cases where property is transferred among the living or on account of death; a transfer in which "property" is named as the object of the transfer, embraces of itself all the property known and unknown, taking into consideration the debts.

(*b*) It is important in cases of liability for debt; for since this has changed from liability of the person to liability of property, the property as a whole is of importance in as far as the liability attaches to all the property both known and unknown.

(*c*) It may happen that one person is the holder of several objects of ownership and that these objects may suffer different fates. In such cases the principle of substitution (*Ersatzgrundsatz*) may be applied; that is, one object out of the property *A* may be substituted for another. What is substituted takes the place of the original; this principle [of alternative obligation] I have already discussed elsewhere.[1]

2. *General Rights and Limited Rights* (*Vollrecht und Teilrecht*)

(*a*) Servitudes (*Substanzrecht*).

1. Wherever there are rights, there too is found the division between general and limited rights [*jura in re*

[1] "Archiv für bürgerliches Recht," XX, p. 1 ff.

propria, and *in re aliena*]. It is found in the sphere of the law of things, both material and immaterial, and also in the law of obligations (*Forderungen*). Everywhere we come upon the difference between servitudes (*Substanzrecht*) and securities (*Wertrecht*).

Hence, there are general rights in things as there are general rights in claims (*Forderungen*); limited rights in the one, as there are in the other; and thus, too, there are servitudes (*Substanzrecht*), and securities (*Wertrecht*).

2. A systematic presentation must therefore make clear the difference between general and limited rights, and between the different kinds of general rights without reference to the kind of rights in question.

This has hitherto been regularly neglected, and the difference between general and limited rights has first been developed in the law of material things; and in this connection ownership, usufruct, pledge rights have been spoken of. These categories have then been transferred to other kinds of values (*Güterarten*), especially to claims (*Forderungen*). This has led to serious errors in method. It was thought that if pledge rights in material things belonged to the law of material things, pledge rights might always be treated as rights in such property, and so with usufruct. A more correct view of the matter would be on the contrary: usufruct, pledge rights, etc., are neither rights in material things nor obligation rights (*Forderungsrechte*), nor immaterial rights (*Immaterialrechte*), but signify a definite degree and a definite kind of limited title (*Berechtigung*), which may occur in relation to proprietary objects of all kinds, and their correlate is not either ownership, obligation rights, or patent rights, but general rights.

3. This does not prevent limited rights in reference to material things from evidencing certain peculiarities of the law of material things; and it is just so with

limited rights in immaterial things, and in obligations. Hence, there is no absolute error in discussing them in connection with the corresponding branches of the law. Only it must always be borne in mind that in dealing with usufruct in relation to material things, to obligations, to inventions, and with pledge rights in material things, etc., we are not concerned with the same right but with entirely different rights, which are alike only in that they stand in a definite relation to the general right; for their qualification is expressed in this, that the law of things, material and immaterial, and the law of obligations have a special character in a certain degree and in a certain way.

4. The essence of limited rights is this, that they embrace a part of the powers of general rights but still leave a residuum to the owner who stands in the background.

If the separation had been made permanent, a dismemberment of the right would have resulted. And this in turn would have involved the greatest difficulties if later one of these limited rights lapsed, so that the original general right would be partially existent, partially non-existent. Most nations have avoided these difficulties by means of the ingenious idea that these limited rights should not form a permanent section cut out of the general right, but should merely be superimposed on it; so that, as long as the limited right exists, the general right is encumbered with it, but as soon as the limited right expires, the general right immediately regains its complete scope. Therefore the cutting of a section out of the general right has not resulted in a permanent reduction and curtailment of the general right, but on the contrary, it has been made possible for this right to return to its former condition, to "consolidate."

Such a consolidation may also occur if the holder of the limited right is also the holder of the general right. But, in such a case, the consolidation conforms to justice only under certain preliminary conditions; that is, if neither of the rights loses by the consolidation. If this is the case, however, both rights continue to exist until the limited right expires or until conditions have changed so that it is no longer necessary to maintain the two rights separately.[1]

This idea is in accord with reason. What rational ground could there be, when rights concur, for diminishing one of them? And yet it was long before this came to be recognized.

5. This instrument of juristic technic is very important; for it makes it possible for ownership to branch out in various directions without danger of property becoming ownerless, which would be the case if only a temporary and passing right were attached to it.

On the other hand, the value of this technic must not be overestimated. It must not be assumed that it is the only proper and acceptable one; for it is quite conceivable that a legal system might allow a general right to a thing with certain restrictions (*beschränktes Vollrecht*), and that should the contingency defined by the restrictions arise, it should annul the right, and declare that no right to the thing exists. In such a case, where there is nothing behind the right, it is irrational to deny it the character of a general right of ownership; for then it is a general right of a qualified nature, subject to being divested. But it is expedient to avoid, as far as possible, this "ownerlessness"; hence, so to arrange the construction, that a general

[1] Compare my "Gesammelten Abhandlungen aus dem römischen und französischen Zivilrecht," respectively 1883 and 1877, p. 295.

right exists behind the qualified right, which, when the latter ceases to be, "consolidates." It is not a necessity of Natural Law to accept this, but it is a useful idea, and one that promotes cultural order.

Types of Limited Rights

1. In the life of nations limited rights of a highly personal nature are common, that grant to an individual during his life-time certain powers, and in particular that allow him the use of a thing in order to provide him, as long as he lives, with certain advantages and to secure to him the means of living in comfort. Such rights have an economic function similar to annuities; except that they grant the benefit to the individual directly and not through the medium of the law of obligations.

2. Such personal limited rights are, first of all, usufruct and usufructuary family rights. It is a matter of surrendering to some one temporarily the possibility of receiving the proceeds of a legal advantage (*Rechtsgut*). This may be done in two ways: either so that the usufructuary himself draws the emoluments directly from the object; or so that the object is administered by a third person who delivers the net proceeds to the usufructuary. The former is the most usual method, the underlying idea being that the individual with a right shall exercise the right himself. But the notion that a temporary possibility of using the proceeds of a thing may be made the object of a right, while what is called the economic substance, that is, the fundamental force (*Grundkraft*) of the thing, still belongs to the holder of the original right, is so rational that it developed independently in the different systems of law. Thus we have the Roman *usus fructus*, the German life pension (*Leibzucht*); it is an almost indispensable factor in civil life. The usufruct may be of particular importance

when it relates to a whole estate; in which case the usufructuary must be given a certain right of disposal to some objects, because without such a right the administration of an estate is inconceivable. Family law especially, in many cases shows instances where members of the family are granted temporarily such a right of usufruct (*Ertragsrecht*), supplementary to the power of personal control of the family. (Compare p. 110.)

3. Such a section cut out of the general right may also be so constituted that it attaches to the personality of the entitled subject. This may be accomplished in either of two ways:

(*a*) So that the holder of the right receives something in addition to the proceeds, in particular the privilege of selling the thing or part of it; this is the case in what is called *Verfügungsniessbrauch*; for example, the life pension (*Leibzucht*)[8] in German law.

(*b*) Sometimes, however, the personal relation is such that the holder of the right receives less than the full proceeds; namely, only as much income as is necessary for his personal maintenance; and in special cases a person may have the right of residence in a dwelling house as far as he needs it for his own personal use. In contrast to this, is the usufruct of rights which, though connected with a person, grants him a right of enjoyment, limited not subjectively but objectively, that is to say, according to the income that a property brings in regularly. This usufruct has this advantage, that the beneficiary is provided for, over and above the mere necessaries of life, and that the question, what is necessary for maintenance and what is not, does not arise, a question that frequently leads to the most painful discussions.

[8] Another case of usufruct in property has just been mentioned. I first developed the whole legal structure of the "Verfügungsniessbrauch" in the "Jahrbücher für Dogmatik," XXIV, p. 187.

4. A special kind of title (*Berechtigung*) allows a person the use of a legal object (*Rechtsgut*), but not an exclusive right to it; so that others may be granted a similar use. His interest might thus become very frail were it not that the proceeds of certain things are so large that a number of such rights of usufruct can exist in common without the interest of one shrinking to a shadow. Especially as regards rights in immaterial things such non-exclusive rights, so-called license rights (*Lizenzrechte*), are very common; but it is quite conceivable that they may exist in respect to other things, for instance, quarries, mines, and so forth.

5. There is still another kind of limited right which is thus characterized: the holder of the limited right has the privilege of using the legal object for the purpose of fulfilling at the same time certain duties towards the holder of the general right. Thus, on one side, this segment taken from the general right imposes a legal encumbrance on the holder of the general right, while, on the other hand, it renders him the service performed by the holder of the limited right. German law with its usual genius has grasped the separateness of these rights. Thus, it was possible for what are called feudal rights to originate; the vassal receiving certain rights in a landed property, with the obligation to render certain services to his lord. The underlying idea here was that the proceeds of the property should make it possible for him to maintain his position, and to give his full measure of service to the feudal owner. This type of limited right is found today in the right of publication (*Verlagsrecht*), the publisher receiving rights of user (*Benutzungsrechte*) in an immaterial thing;[4] to the end that he may bring the latter before the public, and thus

[4] With those who do not agree with me in regard to this parallelism of rights (compare "Autorrecht," p. 290), I do not care to argue further.

work for the advantage of the individual who is entitled to the immaterial thing. The most typical example is the publication of writings, but the same thing has also been developed in other rights in immaterial things; for instance, rights in patents of invention, and even in the sphere of the law of material things, it is quite conceivable.

6. The rights within the general right are often so constituted that they almost exhaust the latter, and leave to its holder only certain rights of supervision (*Aufsichtsrechte*), or, it may be, certain profits which are not connected with the law of obligations in character, but are based on the object. Such rights are especially common in the law of material things (*Sachenrecht*) and, especially, landed property; they are principally the result of bondage-conditions (*Hörigen-Verhältnisse*) arising from the fact that slaves, or the [so-called] half-slaves were allowed to live on the soil and to remain settled on the land with their families (p. 93 (5)), or from the fact that a tenant who would otherwise have lived on the land only for a number of years, was granted a permanent right.

These conditions have become of the greatest possible economic and cultural importance; for owing to them a more or less prosperous peasant or farmer class (*Bauernstand*) has been able to develop, attached to the soil, and thus forming a strong main stock of the population. As time went on, the feeling of independence became more and more pronounced, and the effort to cut loose from the owner continued to grow in power. Thus it was finally achieved that the right of ownership receded in importance, and that in this way a free class of rural inhabitants grew up.

(*b*) Securities. (*Wertrechte.*)

1. Of an entirely different type are the rights that are called securities (*Wertrechte*); the peculiarity of

which consists in this, that the person who is entitled to the security has the power to exercise a right fully or partially in order to obtain from it a certain security limited by the right, and with the attainment of which the right ends. These are rights which do not aim to bring out the intrinsic usefulness of objects in their economic significance. Their sole purpose is to draw a certain money value either from the use or the substance of a thing.

2. The consequence is that the concrete nature of the thing recedes and the abstract advances; it no longer comes under consideration as a separate useful entity, but as a means of security (*Wertwesen*); so that things susceptible of the most different uses serve one and the same end, that is, the realization of value.

3. These rights of security have this great importance, that they break up the rigidity, especially the immobility of property and lend elasticity to the whole; in particular, by drawing out of immovables the value that is in them, they endow them with cultural significance, and by virtue of the uniformity of value, universalize the particularities of the individual objects.[5] This appears from the following:

4. Value may be used for thousands of things, but chattels, land and animals can generally be used only for certain purposes. Hence, it is necessary to convert the particular utility into an abstract monetary value, so that the thing can be of use wherever a monetary value is required to stimulate any speculation, or to satisfy a monetary need. In this way, an object that would otherwise be fit for only five or six purposes, can be made useful for hundreds of purposes. By this

[5] I first developed the idea of "Wertrecht" in the "Archiv für civ. Praxis," vol. 91, p. 155. Of course, my explanations met with vehement contradiction. It would be useless to dispute the matter further.

device, all the thousands and thousands of proprietary objects can be brought under one denominator, and thus can be equally, and independently of their various intrinsic uses, directed toward the most different ends. It is as if money flowed in the veins of the thing, and a stream of money proceeded out of it. Hence security rights belong to the greatest achievements of humanity.

The most important of these security rights, the pledge, will be dealt with in the theory of obligatory relations (*Schuldverhältnisse*) (p. 152).

SECTION IX

II. PERSONALITY AND THE ACTIVITY OF THE PERSON

1. Rights in one's own person, or rights of personality, must be the starting point of every legal system; for every right requires a legal subject and whoever is a legal subject must, as a personality, have the protection of the law. This applies to both physical and juristic persons. Hence, whoever seeks to hinder the activity of personality in the sphere allowed by law infringes the right of personality, and must be restrained.

2. This right of personality expresses itself in particular in the activities of the personality both in and outside the law. Personality must be permitted to be active, that is to say, to bring its will to bear and reveal its significance to the world; for culture can thrive only if persons are able to express themselves, and are in a position to place all their inherent capacities at the command of their will.

We say that a person has the capacity to perform juristic acts, to make wills, but also that he has the capacity to walk, to ride or to produce immaterial values; but these are not special rights, they are per-

sonal powers, and whoever, without the consent of the law, seeks to hinder their exercise infringes the right of personality.

3. Consideration may be taken here, too, of the manifestation of the person as against the State, whether it be in legal procedure, in administration, or in his capacity as an organ of government; all these are capacities that arise out of the right of personality, and that exist as long as the principle holds that personality may develop itself.

4. In this way, especially, activities of the person in public law have a mainstay in the right of personality; they are the expansion of the powers contained in that right, and the latter is their uniform source. It is a mistake to split them up, and divide them into separate single rights; and it is contrary to the fundamental legal idea of the unity of personality with all its separate powers, constituting a cultural entity which may assert itself in the most various directions.

5. This compression into one right of personality, of all the activities of the person, especially those involved in public law and political life, is the key to the whole conception of political rights. There is, indeed, another view, that looks upon the individual as acting as an organ of the whole, to which we shall return later. The acceptation of anything else as the basis of political rights is absurd.

6. Juristic persons also have rights of personality, but in still another direction. The juristic person has as its members the individuals that are connected with it, so that these individuals have, in part, rights in the profits, and, also, in part, in the administration and activity of the juristic person. In the latter connection, we speak of the rights of representation (*Organschaftsrechten*), and understand under these the capacities

that the individual has to participate in the conduct of the juristic person and in all its vital functions. This right is a personal one and is derived from the juristic person, but it is assigned to the individual and is merged in the latter's personality as long as he stands in a definite relation to the juristic person. This point is more fully explained in the "Lehrbuch des bürgerlichen Rechts," to which we refer.

7. The activity of the person may be in lawful acts (*Rechtshandlungen*), or illegal acts (*Unrechtshandlungen*), or in neutral action. In lawful acts, it is essential that the person, as a servant of the legal order, should strive to bring about some change in the position of things. It is characteristic of such acts, that they require a certain maturity of the person; hence we distinguish between persons capable of acts, and those incapable of acts. It also sometimes occurs that there is a medium between these two, the restriction or limitation of acts. Moreover, lawful acts have this in common, that the human will and the law co-operate; the human will giving the direction, on the one hand, and, on the other, the law achieving the fuller development of what arises in the legal order by reason of this will. This combination of the human will and the law is not only the peculiarity of these legal acts, but also their most interesting phase.

8. Used in this sense, the will is not to be taken as meaning the internal will, but the will that is active in the external world. It is the law, however, that achieves those results that appear to be especially suited, on the one side, to serve the freedom of human will, and, on the other, the welfare of the whole. Of particular importance in this connection are the following principles:

(*a*) Man's will must not be undervalued; for only

if it possesses an important power in the law can personality expand, and, through this development of individual personality, the full force of humanity's powers be made effective.

(*b*) The social element, however, must also be considered, especially in connection with those transactions which in their external operation are important as affecting a multiplicity of vital, general interests. If here one and the same transaction affects, not only one, but several persons, it is best that not only the individual will should be considered, but, above all, the meaning which such declaration of the will receives in ordinary usage; for the course of dealing may justly claim that whoever participates in it must yield to it, and that its declarations be understood in accordance with the general custom.

(*c*) Good faith must be preserved in all directions; that is to say, the general custom must be interpreted as the declarations of an honest man, without reservations, as commonly understood. In particular, it must be assumed that if anyone grants something he also grants everything that is necessary to carry out the first thing; and we must be able to depend on it, that whoever consents to anything, will not put obstacles in the other's way if the latter wishes to enjoy the promised advantages; especially, we must have confidence that if one gives a promise, he will not seek to render it vain by crooked ways and underhand means.

(*d*) Otherwise, the law is free to attach those legal consequences that seem good to it to juristic acts, without being slavishly bound to the wills and opinions of the parties; in the first place it can strive to further certain results, to prevent others, and to bring about such a situation in legal life that all interests are reconciled as far as possible.

9. In earlier times people failed to understand that the legal establishment is an intricate structure under which the most various elements must be able to develop; and here, as well as elsewhere, it was thought possible to control a whole mass of cultural phenomena with a single principle. This shows the desperate condition of earlier jurisprudence; it might be compared to a technic that operated with hour-glasses, while we have our chronometers. For this reason, twenty years ago my statements were assailed and criticised, while today no one would hold to the antiquated theories.

SECTION X

III. CLAIMS (*Anspruch*)

1. To the right corresponds the claim, that is, the power to call upon another to perform something. The theory of claims will not be discussed here, since it belongs especially to the technic of the law; but one point must be made clear: a claim exists only where there is a definite power on one side, and a definite obligation on the other, and when, therefore, a person may be called upon, because of this obligation, to act in the other's interests. Hence, a claim requires a special relation which has been brought about as regards this person by virtue of a legal process (*Rechtsvorgang*). Only if thus understood is the conception of the claim productive; only thus does it aid in clarifying the theory of the law.

2. At the present time, it is, indeed, grossly misunderstood, and no other term has been more misinterpreted. Most misleading of all are the following errors:

(*a*) The belief that an owner has a "universal claim" against everyone "not to be molested." This is the

most unproductive idea possible: a legal significance attaches in granting a claim when someone has been injured, a claim that the disturbance cease; but as long as one has not been molested, he must in turn leave the world unmolested, and the idea of a claim against an innocent passer-by who has not disturbed one at all is monstrous.

(*b*) It is equally absurd to suppose that individuals have a claim against the State requiring it to do everything possible for them, in particular to aid them in obtaining their rights. If the State performs its duty, that is its reason for being; if the individual is entitled to turn to the State, and the organs of the State are maintained for the purpose of acting on his motion, there we have, on one side, the exercise of the right of personality, and on the other, the duty of the organs of the State toward the people as a whole; that is to say, they are active in the interests of all, as well as of the individual. To recognize a claim in such a case, a claim, moreover, of any person against any State, again is an entirely false interpretation of the idea of the claim, which is by no means rare among writers, because they use the word claim without having assigned a definite conception to it. This is due to the lack of juristic method and discipline, which, it must be admitted, in view of the present state of philosophic education, is just as little striking as the self-glorifying superiority which it was thought necessary to assume toward me, in announcing such important teachings to the world. I have no reason to enter further into such wrong-headed and unsettled misinterpretations; for, because I rejected the claim to legal protection (*Rechtsschutzanspruch*), it was declared that I, the defender of the parliamentary system of government, was an exponent of the absolute State. I consider it superfluous to make any answer to such a statement.

SECTION XI

IV. LEGAL ORDER

1. *Sources of the Law*

1. The means by which a legal system brings the law into form are called sources of law. They appear in the unconscious organization of the nation, and in its conscious decrees, which first sprang from the law of the chief — in laws.

2. The difference between customary law (*Gewohnheitsrecht*) and a law (*Gesetz*) is not an absolute one. A great deal of customary law will creep into the interpretation of the laws, while, on the other hand, in many directions, the laws will determine customary law.

3. A fuller exposition is given elsewhere ("Lehrbuch des bürgerlichen Rechts", I. p. 78 f., 85 f.).

2. *Equity and Law*

1. As far as possible, the law must be so constructed that it is elastic enough to meet the just requirements of the individual case, in order to avoid a disagreement between the technically logical result, and the ethically juristic requirements. Even Aristotle, as long ago as in his time, dealt with this contradiction. He speaks — in the fifth book of the Nicomachæan ethics — of equity and law, and declares that equity bursts forth when the law with its average principles leads to a result at variance with the idea of justice.

This disagreement may be avoided in several ways. A special law of equity (*Billigkeitsrecht*) may be established, which, however, becomes in turn logically formalized law, and, therefore, is inadequate to fit all cases; for, as soon as it envelopes itself in the form of logical law, it too suffers the fate of being insufficient, in the ramifications of its ideas, to the demands of

justice. Or the expedient may be adopted of framing legal judgments so elastically that they are able to meet the demands of the individual case.

The former method was represented in earlier legal systems (Roman law, English law); the latter is what our modern legal structure is striving towards.

2. This is not feasible everywhere, however; the determination of the law frequently requires that finer points and adaptable suppleness give way to a certain coarsening in the interest of greater facility in handling it. The law must be recognized and applied not only by the judge, but also by the people in their activities; hence, it is often undesirable that it should develop in conformity to criteria that are difficult to perceive and to comprehend. However much it may offend the finer senses of the jurist, coarse forms must sometimes be allowed to take the place of delicate ones, because the latter would perish beneath the strong breath of life.

This has already been dealt with above. (p. 30 (5).)

3. Such a coarsening (*Vergröberung*) is also especially necessary, because the law forms a part of human life, and disagreements in the law exasperate the people and sow the seeds of discord. Consequently, if the law is so constructed that hundreds of disputes can be avoided, it is of great benefit; and a system of law that inclines in this direction is better than a nicely exact system that constantly involves the people in quarrels and conflicts.

3. *Dual System of Acquiring Legal Rights*

1. Not seldom a double legal order is necessary, when certain persons who deal with another must be treated as if they were dealing with the truly entitled subject (*Berechtigte*), even if the person with whom they have made or disputed an agreement was not the

entitled subject. It is very often necessary that certain persons should carry the badge of title (*Berechtigungszeichen*), once for all; and that, by virtue of this sign, the legal relations into which others enter with them should be valid and binding and should bind the person truly entitled. We can imagine, for instance, a case in which a debtor, in ignorance of the fact that the claim has been transferred, pays his original creditor; or a case in which someone has obtained possession of a certificate of inheritance (*Erbschein*) (*bonorum possessio*), and is regarded in the course of dealing as the heir, so that contracts made with him are binding on the inheritance. In this connection the principle also applies, that the heir of a person who has been declared dead is treated, in dealing in respect to the inheritance, as if he were the real heir; even if a mistake has been made and the person who has been declared dead is still living.

2. The double legal order permits the third person, who enters into relations with one who bears the sign of title, afterwards to choose whether he will accept the title of this person, or whether he will disregard the apparent title and recognize the true right.

3. From this basis, cases arise in which the double legal order has been so unified as not to give the third person the choice between the one or the other legal order but to make the person with the insignia of title the only determinative one. So it has come about that a person who purchases movables in good faith may, under certain circumstances, become their owner; although the seller did not own them, but assumed such a position in the transaction that he had to be regarded as the person entitled to sell them. It is the same with rights based on a land registry (*Grundbuchrecht*); whoever buys in good faith by reason of an entry

in a land registry obtains title just as if the entry were correct.

4. A dual system of acquiring legal rights has certain disadvantages, especially a certain insecurity, and this is not always advantageous for the law; hence it can easily be understood that in this matter, particularly as regards the purchase of property, that course is adopted which best conforms to the interests of commerce.[6]

4. *Contingency and Legal Order*

1. Everywhere in the law chance must be excluded, as far as possible; and to every man should be secured what falls to him according to his interests. It must be admitted that this principle is merely a formal one, for what is due the individual is determined by the valuation that the legal order bestows upon his interests; this varies, however, according to the level and conception of culture. Yet, even this formal principle is of importance, in that the law should have no secret folds out of which more or less might flow to the one or the other; but, rather, that everything should be distributed in accordance with value and worthiness.

This is the system of proportionateness of which Aristotle speaks when he says that it is a part of justice that every man should receive what is due him; injustice consists in this, that the one presumes beyond what is due him. Thus did the sage of olden time give expression to the principle that the law must remain as far removed as possible from all chance, and that everyone should receive what is due him according to his position in legal life.

This principle appears especially in the following:

2. In many cases, changes in rights take place, which, according to the principles of the law, cannot be avoided,

[6] It would be a mistake, however, to reject entirely the double legal order on this ground. I have explained the idea in the "Arch. f. b. Recht," XXIV, p. 179.

yet which involve a certain injustice in themselves because they bring about a displacement of values, for which there is no adequate reason. Thus, it may be that in some way, *A* becomes the owner of *B*'s thing, because the interests of the course of dealing with real rights demand it. Such is the case, for instance, if a thing belonging to *B* becomes a component part of a thing belonging to *A*; in this there is, of course, no economic injustice, but there is injustice in respect to the values; for if the law of things desires such an acquisition of property, it cannot by this conceal the fact that it is without reason if, in this manner, the one becomes richer by the acquisition of value and the other poorer by its loss. Justice, in such a case, lies in the real result (*dinglicher Erfolg*) for which the legal order strives; it does not lie in the result in values (*Werterfolg*) that is connected with the real result, and which, on the contrary, is unjust. But in a number of other cases, a displacement of values takes place which is not justified by the circumstances; for instance, if something is made over to someone with certain reservations ("conditions") and these reservations are not realized. But the principle of equalization becomes still much more important in the case of wrongs, where one has injured another by wrong-doing. The legal necessity then arises of transferring the damage from the person who has been injured to the person who has caused the injury, wholly or partially, according to the measure of his guilt and the circumstances of the injured person. In this connection unlawful acts are meant, and the necessity of compensation is apparent.

This equalization is spoken of by Aristotle in the fifth book of the Nicomachæan Ethics as one of the principal tasks of justice. Both when by illegal action, and when by legal events an unjustified displacement of values

takes place, equalization is necessary: this is one of the higher missions of the law.

3. This is true, of course, only when the displacement of values turns out to be unjustified, not when, in spite of a certain degree of harshness, an inherent justification is found in it; as for instance, if in consequence of the lapse of time one suffers legal disadvantage. In this case, the legal disadvantage is founded on the workings of the law itself, hence there is no need of equalization; for by another legal idea the law is declared to be determinative and decisive to meet the present situation. And also if, for instance, the law determines that no adjustment shall be made, even if it is a question of immoral acquisition in which the acts of both parties were immoral, this is equivalent to declaring that the law has already been compensated and that, for higher reasons, the acquisition, though unjust in itself, must stand; that is, it becomes just.

4. A special form of equalization is the elective compensation (*Wahlrechtsausgleichung*). Legal security and legal convenience often make it possible for a creditor to choose one or another of his debtors and to require payment of him. If, on the one side, this is an advance in culture, on the other, it is an injustice, if chance decides, and the person from whom the creditor demands payment is really finally encumbered with the debt. Therefore it is provided in the case of joint obligations that every debtor who has performed, has recourse (*Rückgriff*) for contribution against his co-debtors to bring about a condition of affairs, as if each had paid or contributed his proportionate share. This system is directed towards accomplishing the same ends as the defense of partition (*Einrede der Teilung*), but it has the great advantage of not injuring the creditor: the creditor has the right of free choice, and the debtors must settle the matter among themselves.

SPECIAL PART

A. THE LAW OF INDIVIDUAL PERSONS

CHAPTER VI

THE LAW OF PERSONS

SECTION XII

I. THE LAW OF CLASS

1. *Slavery*

1. Slavery is not, as might be supposed, evidence that culture is lacking, but exhibits considerable economic progress; for in periods in which economic life is but slightly developed, no need of slaves is felt. The household is limited in accordance with the needs of the family and the addition of servants would mean only the increase of family cares and would make it necessary to divide the meager proceeds of industry among a greater number of consumers than formerly. It is not until there is a more developed and growing agricultural or industrial life that the need is felt of slaves as workers in agricultural or industrial pursuits. But when once this point is reached, the need of slavery is so strong that the people would risk everything in order to add to their working force in this way. Wars are carried on for the sake of taking slaves; raids are made, or people belonging to some particular class are oppressed, tormented, and driven by various economic abuses into becoming slaves and rendering a slave's obedience and service.

2. However, slavery has still another, a religious significance: the human sacrifice is generally a sacrifice of slaves. Slaves have been kept for the special purpose of being slaughtered as a sacrifice to gods or spirits, walled up when a house was being built, or offered to the gods of the harvest before a new field was planted.

3. Before the rise of technical, especially of industrial arts, slavery was the only means of obtaining a division of labor on a large scale in a uniform undertaking, for works of that kind require distinct subordination, monotonous and steady exertion, tasks which the workman dislikes, and absolute discipline and order, such as were impossible among free persons in those times. Even the oarsman in the rowing bank could scarcely be a free person; for everywhere that enterprises requiring mass labor were set on foot, slaves could not be dispensed with, since machines were wholly lacking.

4. Hence, no one who looks at the matter entirely from the standpoint of our day, or of human rights, will be able to appreciate slavery in its historical development. Human rights are not advantageous to every development: technical arts must advance, humanity must make progress in industrial life, and for centuries this goes on with the sacrifice of human life. The sacrifice to culture is the highest sacrifice that the individual can make, but it is also one that he must make.

5. Slavery may develop into semi-slavery or bondage:

(*a*) One kind of bondage is pledge service (*Pfandlingschaft*) in which the debtor works off his debt; as he is only temporarily a slave, his lot is lightened. He is bound to service but is not without rights.

(*b*) Also in other cases, however, experience has taught that a slave will do more if his interest is aroused

and he is given a "peculium" which he may use, or own, or partly own. Thus it is in agriculture where the slave is allowed to possess a small tract of land; thus, too, it is in trade and commerce: he has then to pay his lord a certain annual fee.

(*c*) Certain circumstances lighten the slave's condition:

(*aa*) The possibility of buying his freedom develops. As soon as the slave appears as so much capital, the interest on which is represented by his annual service, the thought immediately follows that he can substitute, for himself to his master, capital in money: the sum with which he purchases his freedom.

(*bb*) The female slave is often the concubine of her master; she and her offspring therefore attain a better position. The sexual relation here, as everywhere, is connected with strong psychic influence: the lord does not want his concubine to become another's slave after his death. Therefore she becomes free when he dies, and her children are, if not entirely free, at least half-free.

(*cc*) The slave is allowed to have his wife and family. Thus family life develops: the family is not to be separated, its circle shall not be interfered with.

(*dd*) The house slaves become a part of the household, and the intimacy and confidence that thus grows up between them and the family make them indispensable; often the family is at the mercy of their loyalty and discretion.

(*ee*) Slaves even play a political part. They conduct the most important and responsible affairs and thus attain a firm and unshakable position.

(*ff*) Note should be taken, also, of the *Bondo-Recht*, that is the competency of the slave to change his master if he wishes — an institution to which we shall return later.

6. With the coming of semi-slavery the following changes occur: the slaves become free in principle, and the services that they are required to perform take on another aspect. Such services are then no longer borne in the consciousness of bondage, but are regarded as imposed tasks which encumber the slave class and against which class feeling gradually comes to rebel. The place of the agricultural slaves is filled by free peasants, that of the artisan slaves by technical workmen — with the cessation of their special duties and liabilities they join the middle class. Work now becomes ennobled.

7. To this appreciation of work the ancients attained only in exceptional cases; this is shown especially in Aristotle's "Politics," who, by the way, had a deep historical comprehension of the whole question of slavery.

He fully recognized that in the industrial life of the ancients slavery was a necessity; and his famous assertion, that if the weaver's shuttle worked of itself, no more slaves would be necessary, is the best explanation of the whole institution. Yet, we must reply to this ancient thinker that physical labor, especially if it is carried out with care, attention, and skill, and if the workman has a psychic interest in the result, so that he works with body and mind, by no means lacks nobility and dignity. Consequently, from our point of view, it is wrong to say that persons who perform physical labor must be without rights, so that they may be regarded only as the organs and tools of their master. Moreover, Aristotle too admits that a distinction must be made between slavedom (*Sklaventum*) as a natural institution, and actual slavery, and that it by no means follows that all those persons who were slaves according to the law were also destined by nature to be slaves.

2. *Nobility*

1. The nobility is a favored class among a people, favored partly in political position, partly under civil law, and favored, too, by various honorary rights and in divers other ways to its advantage. Such a nobility has arisen in various ways, most commonly by one people conquering another and treating the native inhabitants as a lower class. But also royalty and the priesthood have frequently been sources of the nobility: as regards royalty, either by raising up the relatives of the royal house to the nobility, or by ennobling those in the king's service; as regards priesthood, because priests were originally looked upon as possessing special spiritual endowments whereby they formed a nobility of a particular kind, which was perpetuated in their descendants, as people supposed the priestly gift to be hereditary.

Frequently, also, possessions ennoble, especially the possession of much landed property; and sometimes a certain piece of property carries a noble title with it, and gives the possessor a prominent position.

2. The privileged members of the nobility are raised to a still greater height by the fact that their marriage is subject to a special restriction; that is to say, a noble can marry only one of equal birth.

3. The existence of a nobility is justified as long as it serves the progress of culture. If the nobles form a higher race, as, for instance, the Aryan Hindoos as compared with the native population, not only is a preferred rank justified, but also the principle, that the mixing of the two, which would lead to a degeneration of the race, is to be strictly avoided, is perfectly right. In addition, the nobility, by reason of its class feeling, its wealth, its relations with the home and foreign governments, has the opportunity of observing the things of life from

a higher plane. If the nobility feels itself obliged, because of its preferred position, to render special service to the State, and to attain to high achievements, that alone proves it to be a pillar of cultural order, and hence fully justified; for, like all classes, it must maintain itself by constant achievements.

4. Here, too, an equalization of the classes will gradually take place; the upper middle class will rise to the nobility in its manner of life, its wealth, and its insight; and thus it may happen that the distinction between the two loses all actuality, and can only be artificially preserved. One point may come under consideration: if it is assumed that the members of the princely houses belong to a higher nobility, it may be justifiable to regard their marriages with persons of equal birth as the only proper ones; for, on the one hand, it is to the advantage of the nation if the different States are thus connected, and, on the other, constant intercourse in higher positions may extend the view of such persons and make them better fitted to rule than others. Moreover, just as marriage connections with royal houses may be advantageous, those with other families may possibly be detrimental; middle class families finding their way into the government in a manner that is not in accordance with the material interests of the realm and the universal culture of the people; as, for instance, if the daughter of a capitalist should become queen, which might lead to the unjust advantage of individuals and great injury to the country.

In this lies the reason for the difference between the higher and the lesser nobility, and the basis of the assertion, that if laws relating to equal birth still exist today, they should apply only to the higher nobility, so that it is entirely unjustifiable to consider the lesser nobility of equal birth.

Our unphilosophic age has failed to comprehend this, as it has so much else, and has given decisions showing that concern for a mass of insignificant trivialities has caused people wholly to misapprehend the spirit of history.

SECTION XIII

II. FAMILY LAW

1. *General Remarks*

1. The propagation of mankind is, of course, the first condition for the development of human culture — in fact, propagation in an increased proportion — for culture requires the aid of all forces, and the great talents that emanate from the mass can only arise from an extensive base of population. This is why nature has endowed man with such a powerful instinct of reproduction, that it may be called the strongest and most irresistible of all our instincts. The legal institutions that regulate human reproduction, and in this way are intended to preserve the perpetuation of the human race, are therefore of the very greatest importance; in fact, they may be termed the most important that humanity possesses.

2. The reproductive activity of human beings, however, corresponding entirely to human nature, is connected with a vast number of psychic emotions, feelings, desires, pleasure and suffering, and therefore involves an abundance of idealities which, in the relations that are grouped about reproduction, may reach the most sublime development. Any treatment of the institutions that concern propagation that does not cultivate and advance these relations not only errs, but it degrades mankind. Hence, nothing could be more abominable than the way in which Natural Law in the seventeenth and eighteenth centuries treated marriage as a kind of

breeding institution, and declared the only important thing to be that the propagation of human beings should go on under suitable conditions and the children be properly brought up. Still more detestable is Kant's view which regards marriage as a lease of the sexual organs — a brutality that will ever remain a blot on German thought.[1]

3. The psychic emotions that are connected with reproduction are feelings of the most intense affection and self-sacrifice in which each individual lays aside his egoism and desires to devote himself entirely to the welfare of the one he loves. This affection leads to an intermingling of the two lives, each one seeking to understand the other, and to devote to him his best self, so that two souls become as one, and each finds in the other its necessary supplement. As a result, the cultural aspirations gain tremendous power, and personality expands in all directions.

4. In this way, the legal institutions that surround reproduction may have a moderating and quieting influence, and, on the other hand, they may act as a stimulus to culture and the mind, besides vitalizing and furthering activity. But, they gain a still more extensive background, through the fact that from the very beginning, even before man became man, nature has endowed at least the female parent with a natural love for her children, who seem to her like a part of herself and in whose development she finds again the first beginnings of her psychic life and the long forgotten recollections of her own youth. In this direction, too, these institutions may become a source of the purest joy; they can lead to idealism and to self-sacrifice by means of which not only the perpetuation of mankind is assured, but also the greatest possible development of its forces is advanced.

[1] See my presentation in "Mann und Weib," II, p. 272 f.

5. The institution the purpose of which is to serve propagation and all the psychic impulses and ideals that surround it, is marriage. Its development and the form it took among the different nations is one of the most fascinating studies of scientific research; but we cannot follow it here. Nor can we deal at length with its original form, group-marriage, in which reproduction took place in groups, the members of which were married to a group of husbands and wives, both men and women being common husbands and wives. This has been elsewhere authenticated, and we need only add, that when people seek to refute the fact by pointing out the sexual relations that exist among the anthropoid apes, etc., that live in small companies, we may reply that it is a characteristic of mankind to strive and work together in larger numbers, and in earlier times the form of marriage that corresponded to this mode of life was not monogamy but group-marriage.

Group-marriage may lead to polyandry, a form that is still found among a large number of peoples, a common custom being for several brothers to have but one wife. This has certain psychic advantages, but also the weighty disadvantage that it decreases the population — especially when it is combined with the slaughter of the female children, the only means of explaining the consistent carrying out of such a system.

Much more frequent, in later periods, is polygyny (or polygamy) which follows naturally in the wake of capture and purchase marriage; for, whatever a man takes possession of, or acquires in this way, he regards as his own. The great expense of such a custom, however, often interferes with its practice; and it must, therefore, be regarded, even among the peoples that permit it, as an exception, not as the rule.

6. The civilized peoples of today are sharply divided into nations of Christian and nations of Mohammedan culture. While Mohammedan culture has retained polygamy, all Christian peoples have adopted monogamy, and regard this institution as such an essential principle of their cultural order that they have declared bigamy to be a grave, major crime. The cultural idea that underlies this, is that a mutual psychic intermingling of lives is made possible only by the self-restraint of two individuals, and that a plurality of wives must lead of itself to the basest passions, to an egoistic self-assertion that poisons marriage, and to constant petty jealousies, suspicions, and prejudices, unless the wives are in complete subjection, and consequently are mentally inferior and without self-assertion — a condition that is equally detrimental to all development; for *it is an irretrievable loss to humanity, if it lacks woman's spiritual cultural effort.*

7. High idealism moved the nations when they attained to the conception that monogamous marriage must be a marriage for life and death, that is, that the surviving spouse must remain true beyond the grave.

> ". . . wir fahren zum Leben zum Tode,
> Uns lockt ein einsames Bild."

This has frequently led to the practice of suttee, the wife following her husband into the grave. But this strained idealism has been given up; for it meant a sacrifice of the future to the present, and is at variance with human nature which in a high degree is subject to the power of time; so that even the most idealistic affections weaken with the passing of the years, lose their actuality, and retreat into the realm of happy recollections. For this reason, there can be no objection from an ethical standpoint to a second marriage; frequently practical circumstances make one advisable, and it is often a prop

and stay during the rest of the life of the bereaved man or woman.

8. One of the most important questions in this connection is that of the indissolubility or dissolubility of marriage; and here, too, a strained idealism commanded absolute indissolubility, largely, to be sure, because of the belief in the mystical union of souls which no act of man could disunite. But this idealism, too, could not always be maintained, and the sublime idea of indissoluble marriage falls before the realities of life; for, as high as is the ideal significance of marriage, just as great are the demands that it makes of those who enter into it, and just as great are the dangers to which it is subject in consequence of differences in human nature, and of the impossibility in some cases of two persons laying aside their peculiarities and adapting themselves entirely to each other. In such a case, marriage may be not only a cause of misery and suffering, but it may hinder psychic development, and great talents and remarkable minds thus be crushed and crippled. This is a frightful danger, and in order to avert it, to some extent, actual separation was allowed in such a case — the least that could be done to avoid constant torture and cruel suffering, the distress of daily excitement and worry. When this is so, however, there is no ethical reason for upholding the marriage, apart from consideration for the children, who themselves scarcely can thrive under such home conditions. To dissolve the marriage in such a case is an urgent cultural necessity.

9. The question has been asked, whether the dissolution of the marriage is not a matter for settlement by the married couple themselves, or even if it is not a matter of free individual choice, so that marriage would really give place to free love. In answer to this,

it must be said that freedom of this sort would be injurious to the majority; for such freedom, too, is an ideal that would come to grief in consequence of the imperfections of human nature. Marriage involves not only joys and pleasures, but also difficult duties and responsibilities which an individual must take upon himself even though he feel them to be a burden. Especially, if either the husband or wife becomes ill, and in need of help, it is one of the most solemn marriage duties of the other to render aid, to comfort, and to alleviate suffering. In these cases, simply to dissolve the marriage would be a heartless barbarism, and in direct contradiction to the highest duties of humanity; for only when men learn to alleviate the suffering of life, will it be possible fully to develop their forces and gifts; suffering natures, in particular, are often persons of deep and remarkable mental power. And in other ways, too, it is advantageous for humanity, if the individual is protected against himself, and cannot easily give rein to passing moods and momentary impulses: hence marriage should be dissoluble only for the weightiest reasons. The constant fear and anxiety that a person would experience, who was daily and hourly subject to a one-sided decree of separation spoken by a partner, perhaps of coarser fibre, would result in mental torture that would form a strong hindrance to culture.

10. The formalities of the marriage contract, and the conditions under which it is dissolved, belong to each nation's own particular system of law.

2. *Exogamy*

1. As a survival of the system of group-marriage, the principle remained, that marriage should not take place in the same group, but in another. This was accomplished as follows:

2. A member of the group *A* was obliged to marry a member of the group *B*; this is called exogamy; and a distinction is made between positive and negative exogamy. In the former, a certain group is designated, from which the man must choose his wife; in the latter he may not marry in his own group, but he may marry a woman out of any other. When the group system and totemism decayed, the principle was retained that no one should marry one of his immediate kin, and a certain remoteness of relationship had to exist before a marriage was permitted. This system has transplanted itself more or less into civilized ages; in such a manner, however, that the group of persons between whom marriage was forbidden has shrunk more and more; so that the circle of those who might marry each other has grown ever wider. But, to a certain extent, the system of exogamy has remained, especially in this, that marriage between brothers and sisters, between parents and children, and between certain degrees of relationship in law, is forbidden. This is not entirely without reasonable foundation. One reason is of hygienic nature: it is assumed that there is reason to fear that marriage between immediate relatives leads to degeneration or to sterility; certainly physical and mental family defects should not be accentuated by such marriages, but should be effaced by marriage with members of other families. A second reason is that different families should form some connection with one another, so that the structure of the State may be firm and close, and not shaken by friction between the various clans or families that compose it; and there is no firmer tie than that formed by marriages between different families. A third reason is ethical in character. The development of sexual passions within the immediate family circle must be prevented, and this can be

best accomplished by making sexual relationships in the family itself detested, so that sexual life between members of the same family may be inconceivable. In this way, culture has artificially created a *horror naturalis*—a phenomenon of frequent appearance; culture creates a second nature, of which, however, the philosophy of law in earlier times had not an inkling.

3. *Family*

(*a*) Organization.

1. The family is bound up with the institution of marriage: the relation of children to their parents is one of the most important problems of humanity; in the first place, because the children require long continued training and education; and then, because the preservation of the family tie, even after the children's education is completed, is of the highest importance.

2. The continuance of family feeling after the children are grown is of the greatest value to humanity; indeed, it stands above all other bonds. On the one side, there is the natural blood-tie, on the other, the close association that has been established during the years of education; both together produce a natural understanding, a harmony of conduct, which should not be lost, but should be cultivated in later life as a lasting common tie and as a pledge of self-sacrificing effort for humanity. (Compare p. 108 (2).)

3. The nature of family feeling will differ, according to whether it is the relation to the mother, or to the father, that is determinative. We, from our point of view, combine both relations, and can scarcely conceive of the time when such a combination was considered impossible; and yet this was the case. As the mother and father belonged to different families, the combination of matriarchy and patriarchy was necessary to

bring the child within the membership of both families. But that was impossible in times when each family lived to itself, and each family circle formed a separate social and political unit which maintained its interests one-sidedly, and expressed them, as far as the other families were concerned, in every way, even in disputes and war. The struggles of those ages are mostly family wars, family fighting against family. Under such conditions it was, if not inconceivable, at least not feasible for one person to belong to more than one family, and hence be committed to both sides in case of war. An individual who belonged to more than one family was in a position similar to the *sujet mixte* of today who belongs to two countries; a state of things which does indeed exist, which is everywhere regarded as deplorable, and to be avoided if possible.

4. The oldest tie was that of the child to the mother and to the maternal family,[2] which is easily comprehensible; for the child is borne by the mother, is often nourished by her for years, and in its early youth is entirely in her care. At the same time, the women are the keepers of the home; whereas the men wander about, and are often absent, especially in times of war. Under such conditions, matriarchy is the only rational arrangement, and it was therefore formerly quite general. Not until later, especially under the influence of wife-purchase and rape, but also for other reasons which will be discussed elsewhere, did matriarchy give way to patriarchy and the child belong to the father and the father's family. This was the plane reached by the cultural legal systems of the ancients, in Indian, Greek, Roman, and Germanic law, and the law of the Eastern Asiatics; and this was the condition that prevailed

[2] Only the complete misunderstanding of ethnology and comparative legal science can lead to a contrary assertion; refutation is superfluous.

during the time that the greatest formations of culture among the nations were accomplished.

5. Patriarchy has great advantages over matriarchy. Under the latter system, the child belongs to the mother, but it also belongs to the mother's relatives; that is, to those who have the same mother as the child's mother; hence, especially, to her brothers, so that the relation between maternal uncle and nephew is the closest that exists between two men. This relation is a natural one only if the mother lives with her brothers, so that brother, sister and sister's child form one household. But such a state of affairs cannot be maintained; as soon as the peoples become nomadic and consequently scatter, it becomes unendurable for the husband to stand apart. Then, of course, if the reproduction of children is to continue, the husband must live with his wife and child; the uncle, on the other hand, lives perhaps in a quite distant district, follows other aims, and has no intimate relations with them. Under such conditions, the closer the marriage and immediate family relation becomes, the more the child, as soon as it needs the guidance of a man's hand, will attach itself to the father, and the more contrary to nature it must appear if the man to whom the child turns is not its father. If the father belongs to family A, the child to family B, the seeds of discord already exist in the heart of the household: in case of war between the two families father and son stand on opposite sides. Such conflicts in a circle in which the greatest loyalty and undivided confidence should rule, poison the whole relationship from the beginning.

Another solution would only be possible, if the wife were the head of the house, and she and her political side determined the whole relation. This system, has, indeed existed; it is called gynarchy, but it has always been

rare, and was soon recognized as contrary to nature. Women have other tasks than that of ruling, and other qualities than the persevering consistency that the life of a ruler demands. Hence, it will be the rule for the husband to be the head of the house, and the unnatural condition that arises if the children are removed from his circle of government will always be felt as a tremendous hindrance to the development of family life. Therefore, only those nations in which the father's right was paramount have been capable of fulfilling the higher duties of national life; they alone have had the inherent strength powerfully to resist storms from within and without.

(*b*) Family Education.

1. The bringing up or training of children took place in the family from the beginning. During the period that group-marriage was general, it took the form of exchanging children to a greater or less extent, so that one or another member of the group was made responsible for one or more children. When monogamy became customary, the child remained with its parents, and such an intimate relation between them and the children was thus developed that the strongest tie was formed. The unity of blood corresponded to the unity of all vital relations.

2. It is therefore comprehensible that history long preserved this tie, and even surrounded it with the glamor of poetry. Even today, the relation between children and parents is one of the most intimate and sacred; it is the source not only of ethical dignity, but also of deep moral strength. (See p. 105 (2).)

3. This institution, however, is not adequate, because the lofty ideals that underlie the whole often fail, and the seeds of anti-culture, even the sources of vice and social anarchy, are sometimes found in the heart of the

family itself. When this is the case it is high time to take the children away from their parents, and to put their training into the hands of the State.

4. A number of nations, even in earlier times, departed from the custom of family training, and introduced another kind which may be divided into two separate systems:

(*a*) The system of foster-paternity (*Pflegvaterschaft*): an altered system of family training, under which another than the real family of the children was made responsible for them. This is justifiable in cases where there is serious immorality in the family, or when exigencies of another nature prevent the family from bringing up the children. But, also, in other circumstances, this system may be advisable; for instance, if the children of nobles, etc., are to be brought up by ordinary citizens, so that they may learn to be simple and thorough.

(*b*) Under another system, the children, especially the boys, were brought up by the State and the temple, so that from their earliest youth their patriotism and civic responsibility might be developed, and that by strict discipline and simple living they might be taught to serve their country and society.

5. The modern custom of giving children into the care of the State, or placing them in other families, therefore, easily finds a precedent in history; and in this connection, too, the principle applies, that no one system can be regarded as universally beneficial. On the contrary, sometimes one method, sometimes another will best fulfill the cultural conditions of a nation.

(*c*) Family Property.

1. Whether property in the family is divided, or is held in common, depends largely upon whether the idea of common property is still powerful, or whether efforts toward individualization have reached the point where

they extend even into the family circle. Even after private ownership was already in existence, family ownership still continued in a wider or narrower sense; and finally, in the narrowest sense, where family property belonged to the immediate family consisting of the parents and their children. Family property continued to be held in this way as the family property of the parents and as the hereditary estate which consolidated the property of the parents and the children. For a long time, we find traces of this common ownership; especially in the community of goods of man and wife, and also in the arrangement that the property of the children belonged to the parents, even when such property was secured to the children. Like a release from these fetters came the idea of a separation of property in connection with a unity of property; that is to say, that individual property should remain separate, but that the possessor of one property should have the right of usufruct in the other. In this way, the emoluments of both properties would be in the same hands. It is not rare to find usufruct combined with the power of disposal, which makes the connection still closer. (Compare p. 76.)

2. Our legal systems stand for the most part on this plane. In some instances, the connection here too has been dissolved. Our matrimonial property laws show an external property connection, the husband having the right of usufruct and disposal in the wife's property, and the right of usufruct in the children's property. Both may lead up to a separation of the property of husband and wife, both of whom, however, are obliged to contribute according to their property to the cost of the household; and it may also be brought about that the child's property becomes free, but that the father may draw upon it in order to pay the expenses of the child's education.

3. Whether this separation really meets the situation, depends largely upon whether individualism has reached such a point that the former state is felt to be an undignified compulsion; and whether, on the whole, the women and children are better off under the one or under the other system. As far as women are concerned, the tendency is all in the direction of property separation, but in such manner that a wife can give her husband the free right of disposal of the emoluments without his being obliged to account for them. In respect to the children, a similar arrangement may be made [in Germany] by the Communal Orphan Council. This system allows of great latitude of treatment according to person, the amount of the property, and the needs of the case, in contrast to the pattern-like rigidity of the law hitherto maintained; and thus the advance of culture here also produces a condition in which the independence of the person is preserved, on the one side, and, on the other, the intimate psychic and social relations of men find expression.

(*d*) Illegitimate Children.

1. As long as matriarchy rules there will be no difference between legitimate and illegitimate children. And even under the laws of patriarchy the principle was originally upheld that a woman's child belonged to her husband irrespective of by whom it was begotten. Not until later was a distinction made; and the child of whom the woman's husband was not the father was disowned. But, if a child was born before marriage (out of wedlock), among many peoples it was killed (often the birth was prevented by abortion), or the child belonged to the mother's family until the mother married, when it was taken into the new family. Of any special disregard of these children born before marriage there is

originally no trace whatever, and a position equal to that of legitimate children was not refused them, until, in times of patriarchy, the idea gained ground that not every child that happened to come into the marriage was to be considered legitimate, but only those begotten by the husband. The consequence was, that the child born before marriage, like the child that was the result of adultery, remained outside the husband's family, and belonged to the mother; the rights on the maternal side, at that period, however, were not very profitable, as the mother did not inherit much and was restricted to the barest necessaries.

2. In later times, the legitimate child occupied another position, when, instead of patriarchy, the combined right of the father and mother was established (the cognate system). The right of the mother then became more important, and this considerably improved the position of the illegitimate child; only the relation to the father and the paternal family was set aside: otherwise the child attained the complete right of the mother, and this at a time when matriarchy was again a ruling power.

3. This position of the illegitimate child with full rights as far as the mother and her family are concerned is found in our law, as, for instance, in the German Civil Code. Earlier German systems of family law, in contradiction to this, assigned to the natural child a subordinate position, even as concerned his rights on the maternal side and denied him wholly, or in part, a right of inheritance. This treatment cannot be justified. The ties of blood are just as strong in the illegitimate child, the need of provision just as urgent, perhaps even more so, as he is left entirely to the care of the mother, and knows no training but hers. Such harshness is also contrary to equity, for the blood unity of the child demands such treatment as should be accorded to blood unity.

Full rights on the maternal side of the illegitimate child cannot be rejected.

4. When, as regards legitimate children, paternal law came to recognize, and procreation in matrimony became the foundation of paternity, it followed, naturally, that the same idea was applied to illegitimate children; and there was a tendency to assign to the father of such children certain legal duties and responsibilities such as belonged to the father of legitimate children. The idea was the more natural, because in the legitimate marriage relation the rights of the father and mother were combined, and it was felt to be but just that such a combination should exist outside of matrimony as regards the parents of illegitimate children. But this attempt met with comprehensible resistance; in the first place, because there are frequently obstacles in the way of establishing the paternity of an illegitimate child, and also, because no enduring relationship exists between the mother and the father. The fact made itself apparent that the combined position of father and mother is something quite different when the father and mother are united in a matrimonial union than when they stand apart and remain separated. The connection of paternal with maternal rights came to a halt at the illegitimate child.

5. Up till now, these obstacles have only partly been overcome. Doubt as to paternity may, indeed, cease when the father acknowledges the child as his own. The other difficulty, on the contrary, must remain as long as the training of children continues to be purely a family matter, and is not undertaken by the State. But, if the latter is the case, there is no longer any reason why the father of the illegitimate child should not fulfil the same duties and responsibilities as the father of legitimate children. In such a case, the bringing up of the

child would be carried out by the State, because of the absence of a family. Such a development should be fostered, because it is unfair to deprive a child of one parent; and, at the same time, it is an offense against the welfare of the nation, and against cultural order if care is not taken to provide the illegitimate child with the training and education necessary to make his energy useful to society, and so to bring him up, that his latent negative impulses are destroyed. The improper treatment of illegitimate children, the ostrich-like policy that fails to see what valuable mental power is thus being lost, has long been a source of deep social injury.

4. *Artificial Relationships*

(*a*) General Remarks.

1. Among nearly all nations, beside the actual blood relationship, an artificial relationship has been recognized involving legal relations equivalent to the ties of blood. A more detailed presentation of the subject belongs to the history of law: it is one of the most interesting pages in the evolution of humanity.

2. We need only emphasize the following points here:

(*a*) The artificial relationship has often given the family new vitality and courage, and even saved whole tribes from decline.

(*b*) As in all important legal institutions, religion played a large part in establishing the artificial relationship.

(*c*) Of the many different kinds of artificial relationship, foster paternity has already been mentioned (p. 109). Many kinds have died out, or have attained importance only in a single case in history (*e.g.*, milk relationship in Islam). Two forms have attained universal historical importance, adoption and blood fraternity (*Blutsbrüderschaft*), of which, however, the latter has disappeared from modern civilization.

(*b*) Adoption.

1. Adoption is an institution of high morality; for the love between parent and child is of the highest ethical and educative value, a source of pure feelings, the starting point of devoted effort, an incentive to high moral endeavor, and thus in itself produces and furthers culture. It is just in the soil of such feelings that the most important ideas germinate, spring up, and bear the richest fruit. Moreover, the foster child that thus receives a better education and training, usually is more efficient than if it were left in disadvantageous circumstances where it might come to an evil end.

2. It is true that adoption would be possible without the law; it is possible for anyone to take a foster child without any legal relation and devote himself to it; but the legal activity of such a relation has a far-reaching and very considerable psychic influence. What, otherwise, only occurs occasionally and uncertainly, thus becomes a regular institution; the child that thus acquires rights, has a much better position than if it were dependent on whim. Particularly, it is spared the unhappy fate, after the death of its benefactor, of being turned out and deprived of maintenance, property, and inheritance.

3. Adoption may be so carried out that the child is taken away from its own family, and becomes a member of the family that adopts it. This is desirable as long as there is strong family cohesion; for a double family membership in such cases is disadvantageous, and places the child in a situation in which it cannot thrive.

It is different where family cohesion is loose so that a number of educational advantages are required outside of the family, in society and in the State, from the fact that family relationship involves its members only in certain directions.

When this is the case, the retention of certain rights in the child's own family is not only possible, but desirable: there is no reason for depriving anyone of more than is necessary to accomplish certain ends. Hence modern law has led to the introduction of a system of incomplete adoption, under which the adopted child retains as many rights as possible in its own family, and receives in addition its adoptive rights.

4. A further question concerns whether the child enters into a relation only with the father that adopts it, or also with the father's family. Modern legal systems have denied the latter, in consideration of the fact that the child retains rights in its own family. It would, however, be perfectly conceivable, and not without value, if, by a joint family resolution or something of the sort, the adopted child should also be granted rights as regards the other members of the family. The adopted child would thus be received into the whole family connection; as was the case, for instance, in the *Aetleidung* of the old Norse law.

5. With the growth of the system of incomplete adoption, another principle has also been developed: that the effects of adoption are one-sided, inasmuch as the child is indeed subject to parental authority in the family that adopts him; but, in other respects, he alone acquires rights, while the father by adoption and his family have no further claim on the child. Here, too, it might be asked, whether it would not be desirable to extend this arrangement; for without doubt the connection becomes closer when claims exist on both sides. It is true that this would also have its disadvantages, since adoption might thus become a matter for speculation, so that motives of avarice might find a footing, and corrupt this beneficial institution. This danger, however, might be averted by careful examination into

each case, and possible prohibition on the part of the authorities.

(*c*) Blood-Fraternity.

1. As an artificial relationship, blood-fraternity has played an important part in the life of nations. The original idea was that the "blood-brothers" were closer to each other than real brothers, and the institution has been a source of the finest self-sacrifice, of ennoblement, of mutual devotion, of the purest unselfishness.

2. Unfortunately, the legal institution has died out; it was much used, and also much abused; it became the spring that set kin-revenge in motion, a means of furthering rebellious acts, and the connecting element in wild and destructive societies.

Nevertheless, its disappearance is greatly to be regretted, for such an incentive to unselfishness, such an aid in all the conditions of life, must always be recognized as promoting culture; just as any ideal in itself strengthens the cultural power of a people, in so far as it is not too closely mixed with destructive elements.

3. Here, too, we must repeat, that such a psychic relation can exist without legal protection or legal form. But what was said of adoption also applies in this case. It is of far-reaching importance, when the law takes hold of, and shapes such institutions; they thereby become normal, and lose their exceptional character, and their significance is greatly enhanced, if what one man expects from another is also required by law. The rigid legal manner of creating and dissolving the relation gives it support and strength, and especially a series of important legal consequences may thus follow; as, for instance, if a blood-brother is privileged to refuse his testimony, or if the shielding of a blood-brother is as unpunishable as that of a real relation, or if the duty of mutual

support, and perhaps also a right of inheritance exist. In all such cases, the law may be appealed to, and the uncertainty and vagueness of relations that exist merely in fact are removed by legal regulation.

4. Will this institution perhaps be revived? Unless there is something in life that supports them, such customs cannot be created; the ardor and enthusiasm that lead to such an ideal cannot be artificially produced; they must proceed from within the nation. Sexual elements rarely entered into the relation (as among the Greeks), nor would they add to its nobility; for sexual commerce between members of the same sex corrupts rather than develops the mind.

5. *Substitutive Family Law*

1. Family training should be fostered as far as possible, even if there are no parents living; other members of the family then take the place of the parents. No difference between parental authority and guardianship originally existed. It is already a step taken from family training towards State training, if, in such cases, a guardian is appointed by the State, who, as an agent of the State, sees to it that the child is cared for, and manages his property. Guardianship still retains much that belonged to the former family régime, it is true, for which reason I speak of substitutive family law.

2. The supervision of the guardian alters very much in the different stages of social organization. Where it is the family that undertakes the chief cultural duties, it is, of course, a council of the family that supervises, and determines the leading principles for the care of the child. But, when the power of the family is dissipated, the State or community must step in, and according to where the greater expert knowledge and the greater readiness to serve are to be expected, one or the other

system will be preferred; accordingly, it is sometimes the courts, sometimes the municipal authorities, etc., that are entrusted with these duties. Here, too, of course, everything is in a state of development. Sometimes, the co-operation of the family is desirable; wherefore, for instance, according to German law, the guardianship court must confer with the family in important cases, and under some circumstances a family council may be appointed, at the head of which, however, stands the guardianship judge. Although in Latin countries the family council plays a more important part, it is only a survival, and is no longer felt to be the adequate form even there.

CHAPTER VII

THE LAW OF PROPERTY

SECTION XIV

I. THE LAW OF THINGS

1. *General Remarks*

1. Ownership in the legal philosophical sense is an individualistic relation of a legal subject to a material object, and presupposes that the material world is apportioned, and does not serve the common enjoyment of all.

2. Whether such a distribution is justified or not, like all questions of a legal philosophical nature, cannot be definitely settled in a universally applicable manner. It depends upon the stage that the development of culture has reached, and also on whether the latter is collective or individualistic in character. The more it particularizes, the more vigorous will be the idea of property, and the deeper will its roots strike into the law and into the hearts of all. It is by no means necessary that all natural objects should be distributed in the same manner; it is possible that an abundance of things may still be held in common, while, as regards the rest, particularization has already gained ground.

Movable things, for instance, are far more liable to particularization than are immovables; for which reason, it is comprehensible that nations have long recognized movable property, while for centuries the ownership of land was still collective. Some movable things are closely connected with each individual's private

mode of life and although it is still possible that they should belong to the collectivity and only be loaned to the individual; yet, the carrying out of this idea presupposes such a high degree of collective spirit, that without it no happiness and no welfare would be possible.

Land, on the contrary, as long as it is merely wandered over in the search for food, may well remain common property; especially, if, as in primitive times, the population is, and continues to be scanty, and the danger of conflicts is slight. But, even when agriculture is practised, and the land is under cultivation, it is possible, though collective spirit may not be strong, to retain community ownership of land and field, with common cultivation and common pasturages. And, even when cultivation is more individualistic in character, a strong element of collective activity will still remain; particularly, when the equipment of the individual is not adequate, and he requires the help of others in cultivating the soil, and overcoming the obstacles of nature. Even when the cultivated land has already been distributed, large tracts will still remain for collective use. Thus, it will be with wood and pasture, private ownership of these long remaining disadvantageous, because individual management only gradually develops to the point where it can include also this kind of territory.

3. Intellectual productions both esthetic and technical also may be subject to private ownership. Esthetic goods again may be writings, music, or paintings; technical productions are inventions, or useful models which accomplish certain ends, and thus are able to fulfill certain human purposes. But all these goods are not entirely individualistic; there is a certain universal human element in them, inasmuch as no one can create

anything without the aid of the mental achievements of earlier periods. But this does not prevent his having for his own whatever he produces independently with this raw material.

The term intellectual property has been used in this connection, but it is more accurate to speak of rights in immaterial things. It is peculiar to them all that they are not permanent but temporary; and they are so, not by chance, or by positive legal provision, but of necessity, as such mental achievements become in time universal cultural possessions, and the formative material of human activity.

This subject is fully treated in the "Lehrbuch des bürgerlichen Rechts" and need not be considered here, since an exposition of civil law is not possible without taking into consideration its legal philosophical elements. For this reason, my writings on the subject contain the legal philosophical explanations that are necessary to an understanding of it.

4. Not all goods are amenable to detachment and special title in the same way. There are some that cannot be detached at all, and others that can be so only for a time. There are things that are indisputably intended to be universal, because the conditions of human life rest upon them; as, for instance, the air and the sea: these cannot be isolated, and therefore cannot be made the objects of private rights. Other goods may, indeed, be detached for a time, but their tendency is to become universal, inasmuch as the purpose for which they are designed would make the enjoyment of them general. These include, as we have said, immaterial things, inventions, etc.; it is possible that, for a time, they may be the object of a special right, but, if they prove to be enduring, it is absolutely necessary that society should have access to them, if for no other

reason, because they help to form the foundations of intellectual or technical culture, and new conditions of life are based upon them. But, if an invention is not successful, and proves to be valueless, its reversion is the more necessary, for unproductive rights are a useless hindrance, and a source of human detriment.

One means of preventing the isolation and separation from commerce of certain goods was the taboo.

Taboo, in this narrower sense, the taboo of things, arose thus: by command of the priests, or the chief, a thing was assigned to a higher circle of life. Thus, a kind of consecration was established, the object being dedicated to the cult, or the royal service. In this way, it was possible to reserve a number of things for higher State or religious use, which would have performed much less service if used for the ordinary needs of life. In this respect, too, the taboo was extremely promotive of human culture. (Compare p. 67.)

5. Running water is common property; yet, it may become subject to private right, though not in the manner formerly thought; that is to say, that the wave of running water as it progresses, belongs first to *A*, then to *B*, then to *C*. The idea of such constantly changing ownership is just as absurd as if we should assume that game belongs to the man on whose property it happens to be at the moment. Property that would thus change hands, as the wind changes, would be too much at variance with the idea of ownership altogether. On the other hand, it must be acknowledged that private rights in water and in its forces may exist, and especially is this true of the descent of water and the power thus produced. Such a right can only be conceived of as an immaterial right, similar to the right in electricity, and belongs either to the owner of the river bed or to another, and entitles the holder to the exclusive use of the temporarily and locally established power.

6. Individualization requires an apportionment of personal goods, so that each individual may live his life, and develop his powers. For humanity cannot attain its aims, unless the springs are uncovered that lie dormant in every single being, and that are inactive so long as the individual is held fast in collectivity. Hence, much must take place now that formerly was not known. Training and education assume an entirely different aspect, the relation between the sexes is elevating and beneficial in its influence, friendship becomes brotherhood, and an abundance of new associations serve to guide individual efforts into common ways, in order thus to promote multifarious intellectual interests. Parental rights, household rights, family and guardianship rights, marriage rights, and association rights will develop, and thus contribute to the growth of new and mighty cultural possessions. And just as the protection of ownership will strengthen, to the utmost, the power of production as regards material goods, so, too, the protection of mental creations will have a powerful effect; for the individual must rule as an individual, he must enjoy the fruit of his labor; in this, as in other respects, sound individualism must govern mankind, and act as an incentive to new achievements.

7. In this manner, tremendous forms of activity will arise, and with them the constant new production of goods on the one hand, and, on the other, the constant new distribution that makes it possible for goods to be held sometimes individually, and again collectively, so that they become productive and useful. For it is one of the qualities of economic values, that they are sometimes more effective when isolated, sometimes when held in a wisely planned combination of ownership, than when they are subject to the indiscriminate participation of all. The chief aim is now to develop to the

utmost individual property, now to achieve those combinations that are fitted to produce much that is new and significant. Culture with individualization, and with a well planned combination ownership of goods, is the permanent source of new vital advantages and new productions of life.

8. The growth of individual ownership, then, has been an important means of promoting human culture, just as has the individualization of men, for it has vastly increased and accelerated human powers. By means of greater variety, a wealth of relations has been created, and at the same time man's command of the goods of the earth has been tremendously strengthened. For now much more is thought out, much more is planned and tried, than formerly; and, above all, that sound egoism appears which controls civilized humanity and will not again forsake it. For what a man owns for himself and to his own advantage, he possesses with a double affection, and he will make far greater efforts to obtain it, than if others besides himself, or the whole community, were to profit. Here too, of course, the cunning of the cosmic system creates fancies and dreams. It promises man all kinds of delights, when he shall have obtained certain goods, and after he has obtained them, disillusionment and disappointment follow. But this imaginative life has always been exceedingly promotive of culture.

9. The individual ownership of land often requires improvement; for great as are the advantages of a secure apportionment of property, it thereby becoming possible for the individual owner to make use of the thing in every way, and to develop its economic powers, yet the geographical situation and economic position of lands frequently demand that other property be involved; because otherwise land, sometimes, could not

be developed to the utmost, and a part, at least, of its uses might be cut off. Think of a piece of land, on which there is no water, and that can only obtain it by conducting it through other property, or that can be connected with electric current only in the same way. In such and similar cases, a very slight restriction or encumbrance on the one side often means a tremendous advantage on the other. In order that such lands can be developed, prædial servitudes have been introduced; that is, privileges, which for the benefit of one property encumber another, and which entitle the holder to erect certain kinds of works on this other property, to use it in certain ways, or to demand that the other property shall not be altered to interfere with the use of the first property. These prædial servitudes are attached to land, and, accordingly, we speak of *prædium dominans* and *prædium serviens*. Legally, of course, the matter is so arranged, that the holder of the *prædium dominans* is also entitled to the servitude. But this must not be understood as meaning that the right attaches to the owner of the *prædium dominans*; on the contrary, whoever owns the right in the dominant land, for the exercise of which the other piece of land must be utilized, can make use of the servitude. Hence, this servitude cannot be said to belong only to the owner, but to all who have rights in the dominant land according to the nature of their rights; and that is what is meant, when we say that the land itself is the entitled subject.

The further explanation of this point belongs to the civil law, and is contained in the "Lehrbuch des bürgerlichen Rechts"; I have also given it in part elsewhere. It is essential that the legal system should encourage landed property in the greatest possible way; yet, on the other hand, it is equally necessary that the *prædium*

serviens should be encumbered as little as possible so that its own use may not be interfered with. Especially should the desire to transfer the servitude to other land be met, in as far as this can be done, without detracting from the advantages of the dominant land; for here, too, that law is the best that most effectively balances the most opposing interests.

2. *Acquisition and Loss of Ownership*

(*a*) Original Acquisition.

1. The manner in which the legal system admits the individual to ownership, relates to its historical development, and is nowhere based entirely on reasonable grounds. It is a factor in the origin of States, and cannot be understood by itself alone, but only as a part of the great process of the national creation of culture. With conquering nations, it is the power of the conquerors that is determinative; and the principle of international law, that possession once acquired contains a certain element of reason, and cannot be altered at will, also applies here. But when material goods have to an important degree entered into human commerce, our concern is no longer with the original but with the derivative acquisition.

2. Nevertheless, even now, when reasonable regulation is possible and conditions of peace are established, there are still cases of original acquisition; and in this connection, it must be said, that it is especially in accordance with the law that a man should become the owner of what he gains by his own efforts, by connecting his individuality with the object. This is the acquisition of ownership by labor, a doctrine that has been defended by Locke, among others, and which cannot be exaggerated except in so far as this mode of acquisition cannot be considered exclusive.

3. As soon as mankind is individualized, the work of each man becomes individualized; that is, he wants and may have his work to himself, and need not suffer it to be returned to the collectivity. In the acquisition of ownership, the principle follows of itself, that if a man has put his work into a natural product, by transferring it from the world of nature to the world of universal human control, or by otherwise increasing its usefulness, and intensifying its character as wealth, he can demand that his relation to it should be nearer than that of others, because he has put a part of his personality into it, and thus given it something of himself.

From this there follows the justification of acquisition of ownership by taking possession, and by improvement, the principle being upheld that it is not the amount of work that is of importance, but the usefulness resulting from the work, that is, that the thing is made susceptible of human interests, with greater or lesser advantages.

For the taking possession also must be regarded as a kind of work; work must be understood to mean everything that puts something, either in its original or in an improved form, within the reach of human enjoyment and control. Above all, what is called improvement or specification must here be taken into consideration. Here work even appears as the binding and essentially determinative element of the matter, as opposed to ownership of the material, and may even overcome the latter unless the material is of such importance that it is able to withstand the attack. The measure of importance, however, is determined by the relative values in the thing that consists of materials and work.

4. Another basis of acquisition of ownership is usucaption. In this process, time gives its sanction to the relation of the individual to the thing; time and

everything that transpires within it. For in time, cultural processes go on, in which material things play an auxiliary part, so that they become a constituent part of cultural achievement. To remove things from this connection would be contrary to culture; usucaption must prevent that.

(*b*) Barter and its Consequences.

1. In order that property may fulfill its cultural purposes, it must be exchangeable; for only thus does it become possible for wealth to reach the place where it will be most effective. This has still further advantages, for it infinitely increases productive power. A man does not produce only what he can use himself, but considerably more, so that he can exchange with others to his own advantage. It is only in this way that work systematically designed for exchange, and the division of labor that it involves, can arise; and with it are connected the recognized advantages of the division of labor. The workman attains greater skill; he adjusts his life to his work; makes the necessary arrangements to carry it on, on a large scale; and will therefore produce more and better work than under other conditions. And, as this applies to others as well, three, four, or six times as much will be produced as if each man were obliged to obtain for himself all the necessary natural products. This division of labor, which was recognized even by Plato ("De Republ.," ii) and Aristotle in his "Politics," as a means of promoting culture, and which was excessively valued by Adam Smith in the eighteenth century, presupposes, of course, that a man can exchange those goods that he does not need for others for his own personal use. This possibility of exchange is also necessary; because if a man's production is one-sided, his other needs are not

provided for, and he requires the addition of things that are produced by others. For this reason, then, wealth becomes transferable.

2. The transfer of a right is distinguished from its re-founding, in that the special peculiarity of the right that has been formed through its original founding and previous destinies does not disappear, but continues in the possession of a later entitled subject. Hence, we cannot say that the right of the other is simply a new right; as a new right it is at the same time a continuation of the old right with its peculiar qualities.

3. These qualities may be entirely maintained or only a few may be taken over, and the right held by the successor may be more or less stripped of them. It is therefore possible that the successor may obtain more rights than his predecessor had; for the legal system often has reason to depart from the maintenance of the original situation, and to assign to the successor's act of acquisition a significance that exceeds it.

One main reason for this is public confidence in connection with the certainties that some transfers offer, so that the transferee expects, and according to the ideas of commerce, is justified in expecting, that he is procuring a complete right unrestricted by its former particularities.

It is a complete mistake to assume that the Roman principle, according to which no one can transfer more rights than he himself has, is a universally applicable one, rooted in the nature of the matter. That can only be asserted by a superficial legal view. On the contary, it is very easily possible that the successor may acquire more rights than his predecessor had; and just in this lies that peculiarity on which the security of commerce is based.

This principle of acquisition also leads to loss of ownership, and this subject is dealt with under the extinction of rights, p. 133.

4. The transferability of ownership is the cause of the differences of wealth, and is largely the source of the tremendous inequalities and abuses that they involve, for:

(*a*) One man will be fortunate, the other unfortunate, in handling his wealth.

(*b*) Some men in case of need, or for lack of judgment, will dispose of their wealth for an inadequate or temporary equivalent.

Added to this, is the right of succession, which will be discussed later, and which is also a great source of inequality, if only because in one family the inheritance falls to two, in others to six, eight or ten heirs.

This inequality cannot be removed, it can only be lessened, and this is attempted in several ways:

(*a*) The condition of the laborer is improved, thus making it possible for him, in spite of the lack of capital, to work his way up and out.

(*b*) The wealth of foundations or other permanent funds are used to aid persons who lack neither the ability nor the willingness to work, but merely the principal means.

(*c*) In times of pressure the needy are cared for, thus preventing their becoming entirely impoverished.

(*d*) Above all, however, by social cohesion the weak are enabled to help themselves, the small capitalists to aid one another, and thus the progress of all is promoted.

5. All these endeavors depend on the principle of development mentioned above, according to which individualization always makes again for collectivity, and inequality for equality. But, of course, no civilized State will give up the achievements that have been accomplished by centuries of effort, unless, indeed, history should again commit one of its illogical sins, and that the mind of man should wander again in error, and not return

to the consciousness of its high cultural duties until after centuries had elapsed. Private property, then, must remain, but by co-operation it is again socialized; and just as work gave it dominant control, so too it is united work that confronts it, as a new and powerful factor, and new forms arise under the tremendous activity of generations. These alliances and unions and their significance have already been spoken of above. (p. 124 (7).)

6. Sometimes the operation of mines is combined with land-ownership; sometimes mines are worked independently, and are either made subject to State management, or are operated simply under mining rights. In this respect, too, no definite, exclusively just system can be established. Only the following must be noted:

Separation of mining from land ownership has great advantages because, of course, the veins do not coincide with the land boundaries, and because the technic and capitalization of agriculture are so absolutely different from those of mining that a combination of the two must be more or less detrimental. Whether, then, freedom of mining or a government monopoly is introduced will depend largely on whether, in the individual case, freedom or constraint is the more practical. Mining freedom may at times contribute greatly to the discovery and development of mineral resources; on the other hand, by way of combinations, it may lead to all the evils of monopolization and trust control. The price of necessary minerals like coal may be artificially raised, and especially foreign enterprise may obtain control of domestic resources to an undesirable extent. When indications of such a state of affairs appear, it is well for the State to lay its hand on the treasures of the country, and to regulate the acquisition of mining rights by granting concessions.

(c) Extinction.

1. Whatever exists is worthy to perish, and this includes also ownership. Cases may occur in which ownership must at once disappear. The State, indeed, should not interfere arbitrarily and should give compensation whenever it expropriates anything, but this is a principle that does not belong to the doctrine of ownership but to the just distribution of burdens. If the State needs the property of an individual, it must not burden this person with more than others have to carry, but must distribute the charges; that is to say, it must assign an equivalent to the person from whom the expropriation is made so that he need not contribute more to the furtherance of the public interest than do others. (Compare p. 210.)

2. Far more important, however, is the cessation of ownership brought about by its collision with the demands of commerce. There are many cases when ownership must bow to the interests of third persons who act in good faith, and where especially institutions connected with commerce exist which because of their public character require security in the acquisition of ownership and where the transferee gets as much right as he can expect under these circumstances. (Compare p. 130 (2).)

3. This collision, between ownership on the one side, and the needs of commerce on the other, has given rise to all those principles, that make the transferee who acquires in good faith the owner without regard to the ownership of the transferror, so that the actual owner suffers the loss.[1]

4. This acquisition of a right is connected with the dual system of legal rights and with the principles of transferability, both of which have been dealt with above. (Compare p. 87 and p. 130.)

[1] *Binding's* effusion on the injustice of acquiring property from one who is not the owner has been characterized by *Neubecker*, "Archiv f. Strafrecht," 55, p. 146.

SECTION XV

II. THE LAW OF OBLIGATIONS

FIRST DIVISION

THE LAW OF OBLIGATIONS IN GENERAL

1. *Foundations of the Law of Obligations*

1. The legal bond that is formed, when an obligor takes upon himself an obligation, and thus places himself under the compulsion of the law, is necessary to commerce, hence, also, to cultural order. No culture can exist without such a law of obligations, and especially no advanced culture in which wealth is produced, not mainly by those who enjoy it, but by other persons. It is the province of the law of obligations, in these circumstances, to provide that wealth shall come either directly or indirectly into the possession of those who can employ it. (Compare p. 129.)

2. Obligatory relations, therefore, are based on a system of individual economic spheres, and are intended to place these in a permanent relation to one another, so that they are able to accomplish more than if they were separated and isolated: in other words, the separation that has been brought about as a consequence of private management is made to cease when a higher plane is reached. In particular, obligatory relations make possible an exchange of economic objects, and protect society from the ossification that would take place if the distribution of wealth were eternal and unalterable. Hence, without affecting individual activity too greatly, they are an excellent means of procuring for it the advantages of collective effort, of bringing about the

distribution of wealth to the persons who require it more than others, notwithstanding the manner in which it may be distributed already; so that instead of a permanent distribution, a constant re-distribution and re-allotment takes place, and everything is kept in constant motion. (Compare p. 124.)

3. In addition, obligatory relations bring the future to the aid of the present. Just as they ignore distance, and make commodities from the farthest points subject to exchange, so, too, they bridge over time, and press what the future has to bring into the service of the present. This is a tremendous aid to the development of intellectual powers; for many people can achieve more than they ordinarily would if they can obtain existing wealth in exchange for what they will have to offer in the future. It is just the most energetic and ambitious natures that can procure, in this way, the means for the production of new goods.

Thus, it is the function of the law of obligations to smooth away inequalities and chance, and thereby to make it possible for the values that are inherent in humanity to become effective in their proper proportions. In this way, it liberates development, and relieves it from the hazards of time. A great variety of values lie in the future, and for the time being, do not exist for the present: time is the stepmother of humanity; it suppresses values that deserve full recognition and application. And, in this contingency, it is the province of the law of obligations to draw the future into the present. By this means, economic life, in fact the whole world of human values, is tremendously enriched, and the future already devotes its gifts to the present.

4. The nations that thus "discount" the future are optimistic nations, full of the joy of production. But not all nations are so; some refuse to reach into the

future: to them it is inviolably sacred, or it is nothing, and lies outside the range of commerce. This conception of the future as a blank page lying beyond our power is thoroughly oriental (p. 28), and it explains the oriental prohibition of transactions involving future values; for, in such transactions, one gives a present value for a future value which presently is not recognized by the law. Chance is an immense factor in the future, and the Orient does not concern itself with chance.

This also explains the prohibition of usury, that is to say, of taking interest; even though the money produces profit, yet this is only the result of future acquisitive activity. This future result cannot be considered at the time; and as it does not come into consideration, no equivalent value can be given for it, otherwise interest would be given in payment for nothing. From this, too, we understand why, in the Orient, the prohibition of taking interest, and the prohibition of transactions involving future things, are related and appear as one institution.

This subject will be dealt with again later. (p. 17.)

5. Obligatory relations, moreover, draw the powers of individuals into commerce, and in this way substitute the possibility of free labor for slavery. In ancient times, men either worked for themselves or as slaves; work for others, under different circumstances, was exceptional, and assumed more the form of a kind act. (p. 95.) It was not until the idea arose that an individual might take upon himself the obligation to perform work for another without becoming subject to the other's arbitrary domestic power that a free right to work was created. At the same time, the bonds of slavery were loosed, and an infinite development of personal power was made possible. This idea excites the powerful impulse to action of those wholly unfavored by the gifts

of fortune, or in whom the keen ambition to acquire further wealth is inherent. (Compare p. 177.)

6. From the beginning, the law of obligations has had also an ethical character: everywhere ethics stood by its cradle. But at the same time, it has also been the means of raising the ethical standard of humanity. The ethical element that enters into consideration here is the reliability or dependableness of the person. Here, too, the object is to exclude chance and replace it with law and rule. If a man has once given his word it must not depend on chance whether he fulfills it or not; others must be able to build on it, and to arrange their affairs accordingly. A man who is true to his word acts more morally than one who is not, first because he obeys a rule, and not his own desire, and then because, in the interest of another, he struggles against his humor and egoism which might lead him to break his word. Adherence to a promise thus reaches deep into moral life. It follows the command of truth which here is moved from the present into the future. The person who promises must make his word come true; for when he promises, he gives the assurance that in the future some definite thing will occur, and he must see to it that it does occur.

Like everything of an ethical nature, this too was originally bound up with religion, and hence has a strong cultural significance; for religion is always promotive of inner culture, and gives utterance to the deeper sides of humanity. But, even separated from religion, ethics has been of importance for the development of mankind.

7. The idea that a man must remain true to his word is one of the main levers of the law of obligations; for obligations are based to a large extent on promises, on contracts. The thought of an obligatory tie is asso-

ciated with the sacredness of a promise, because the fulfillment of the obligation is nothing but keeping the given word: the two concur.

And, as in the organic world two things always act upon each other, so too it is in this case. The law of obligations originates in the demand of faithfulness, but it also itself demands that a promise be kept by aiming constantly at the fulfillment of the given word. In this lies the extraordinary ethical value of the law of obligations; it cultivates in man the spirit of faithfulness to his word and his agreements, and works against arbitrary desire, and still more, immoral trickery.

The explanation of how the idea of faithfulness to a promise fructified the law of obligations must be given in the history of the law. And there, too, it must be shown how this ethical idea appeared in religious attire, and long retained this religious character (p. 137); the promise was made in the presence of the gods, strengthened by sacrifices at their altars, and an oath was taken inviting their curse if the word should be broken. Sometimes, men even took certain definite disadvantages upon themselves in case they should not keep their word, and pledged their bodies, their lives, their liberty, their honor, their allegiance to their country, and in fact all values, as has been described elsewhere.[2]

8. The general aims of legal culture and the particular ethical aims of the law of obligations are not always in accord with each other. The future may be discounted for the present, and present and future values balanced against each other, only in as far as these values are not opposed by moral and economic obstacles. The reasons that can be advanced against immoral and uneconomic action apply, of course, more strongly to the use of legal means for such a purpose. On

[2] "Shakespeare vor dem Forum der Jurisprudenz," (1883).

the other hand, the principle of faithfulness to an agreement will admit of no restrictions; it requires the fulfillment of the promise to the last jot; it demands that the man who promises shall not be able under any pretext to free himself from carrying out his word. Thus the sacredness of the promise leads to a certain painful rigidity; it results that the word must be kept, regardless of all else, and of any circumstances of the case that may oppose it. Thus, men come to feel that a promise must be kept, even when it is at variance with general morality, or is entirely uneconomic in its result. This also gives rise to the principle, that gambling debts are debts of honor, and, even though not recognized by the law, must, by reason of the given word, be all the more punctiliously discharged.

These two principles long stood in contradiction to each other, and, indeed, even today, this contradiction has not been fully reconciled. It is found especially in earlier discussions of the vow, and of the question, to what extent a man might free himself from his vow, if, being carried out, it involved immoral action, or produced a detrimental result not justified by the circumstances. In such a case, the nullification of the vow was more or less used as an expedient.[8]

The solution can only be in this: that the principle of faithfulness to an agreement must be made subservient to universal cultural law, and the principle brought into prominence, that where immorality and corruption lie, even the given word is not entitled to abuse the sacredness of the law. It must be clearly recognized, that the fulfillment of a promise that is contrary to morality in its nature, is merely a second immoral act, and therefore a wrong. This is the only way

[8] *Cf. Kohler and Liesegang*, "Das römische Recht am Niederrhein," II, p. 59, *seq.*

in which we free ourselves from formalism, and sink the promise in the depths of moral cultural law.

9. This is especially true of that kind of immorality that leads to the restriction of personal liberty. In this respect the following applies:

The right to make contracts emanates from the freedom of human activity, and this freedom is the nerve of the development of the individual and the culture that he produces. But as has already been said, this must be within limits. The objects of a contract or agreement may conflict with the interests of morality or economics; the liberty to make contracts might be misused to enslave the individual and fetter his future. How far, in this connection, freedom extends, varies in the different stages of culture; where slavery is accepted, a man can in various ways make a slave of himself; where slavery is rejected, all efforts are forbidden that bring about slave-like conditions.

Two facts especially come under consideration here:

(*a*) The effect of the liberty of contract is beneficial only if the contracting parties are free to decide; and, especially, if a certain possibility of choice exists, so that the person is not in a necessitous situation. Transactions concluded in a necessitous situation are also indeed valid, but disproportionate advantage must not be taken of the necessitous situation: that would be unconscionable and is forbidden.

(*b*) The liberty of contract may also be corrupt in its effect, if a whole class of persons is driven by the exigencies of life to make contracts of a certain kind, and the freedom to make contracts would lead to the oppression of these persons: the economically weak would succumb. Here, it is for the law especially to determine that such contracts must not contain certain conditions which oppress the economically weak. (p. 177.)

(*c*) The right of contract may also be abused in the formation of associations that control commerce, and turn it out of its natural channel. This is a new phase of economic culture that has come to us from the United States. The corporations control markets, and give mankind their laws. Little can be accomplished by direct coercive measures. The most correct and efficient means of remedying the evil is to apprehend human nature down to the bottom, and to permit the individual to withdraw from the combination at any time.[4] Then the system will crumble away of itself. And if the attempt is made to perpetuate it in the form of trusts, individual management being embraced in one great whole, individual interests will again lead to the collapse of such artificial formations and will destroy the excrescences of the associational instinct.

How impolitic are all laws that proceed only by prohibitions! We must fight human nature with itself!

10. It is the province of legal history to describe the technical development of the law of obligations beginning with the stage where the debtor pledged his body and his life, up to the time when the bare obligation sufficed, and ceased to operate against the person, and attached only against what envelops it, property. It is only necessary to emphasize the following point of view. The law of obligations, which on the one side is rooted in the sacredness of religion, finds its support, on the other side, in the relations of power between the creditor and the debtor. The debtor is originally the needy one, and he offers himself to the creditor, subjugates himself to him as a slave and servant: in this situation, it is possible for the creditor to squeeze the value of the debt out of the person of the debtor and

[4] See "Ideale im Recht," p. 58, *seq.* This proposal was ignored and so of course a dilemma arose.

his family in most rigorous fashion. This conception is strengthened in periods during which slavery is customary.[5] Military slavery and slavery for debt, stand side by side; but even earlier, the view arises that the military slave is a foreigner, the slave for debt, a member of the tribe. If the desperate expedient is not adopted of selling the debtor slave out of the country, if he is to be kept at home, the tendency will be to free him from the hard conditions of slavery, and to ameliorate his lot. Thus gradually the debtor-slave becomes a debtor-laborer, a pawn, and he may be redeemed. (Compare p. 94.)

If the power of the creditor is thus weakened, and set within definite limitations, the law of obligations must be built up on another basis.

A pledge of future action takes the place of pledge of the person. Obligation involves a "shall," that is to say, a command determining conduct, directed to a certain person, and which he must obey if he wishes to be an unexceptionable and unblamable member of a legally ordered society. In this way, the idea of duty appears, the idea of a connection between the individual and the community consisting in this, that the individual must sacrifice his will to the whole and must serve it.

11. Obligation also has its place in moral philosophy. There, too, it concerns the relation of the individual to the whole, in as far as the latter is the guardian of moral endeavors. There, also, it is a command to the individual to be moral and to act morally.

12. This duty has been much exaggerated, and by nobody more than by Kant and his successors, who saw in the combination of the categorical imperative with metaphysics (which Kant himself rejected, or at least declared to be unproven), the salvation of humanity.

[5] See above, p. 92.

In reality, it is not a rigid command but the participation of the individual in the whole that produces duty; hence it follows that:

(*a*) It is evidence of a higher state of morality if the individual does not regard the command as such, but is so much in unity with the whole, in his thoughts and feelings, that even without a special command he fulfills the duties of the law and morality.

(*b*) So much the more is the view to be rejected, that morality consists only in obeying a commandment, in opposition to one's self and one's own wishes and aspirations. This only is true, that when the individual's sense of the unity of all is not yet so far developed that conformity to duty has become second nature, he should nevertheless fulfill this duty and must therefore, if necessary, perform an act of self-conquest.

13. The binding power of the promise has generally been made dependent on this, that the creditor accepts the promise, that is, agrees to it. The reason for this is obvious: it is not desired that other people should interfere in our affairs. Some performances may be very inconvenient for the creditor, some burdensome, some even quite detrimental; especially, if a man could be reproached with plundering other persons, or abusing an office or position in order to receive gifts from others. In any case, it is in accordance with healthy commerce, if one always remains the master over his own property.

Historically, a peculiar element contributed to this result, namely, that the creditor took possession of the debtor and controlled his person. In that case, of course, action was necessary on the part of the creditor, and he had to dispose of the debtor in some way, if the latter put himself at his service.

If, notwithstanding, cases have developed in which the creditor became entitled through the mere unaccepted promise of the debtor, various circumstances have been determinative in producing them.

If a man vowed something to the gods, he was immediately bound; for everyone believed that the gods themselves accepted, and so it came about that obligations to the city (to the gods of the city) were often declared binding without further formalities. But, above all, it is very comprehensible, that the debtor should assume an obligation to everyone who enters into a certain relation to a thing or matter; for, in this case, the creditor is at liberty to enter into such a relation or not, and thus he does indirectly accept the promise and apply it to himself. Here belongs, especially, the case of the debtor who promises to be liable to anyone who holds a certain paper; for it rests with the creditor to acquire the paper, or to dispose of it again; thus, he does not become the creditor against his will, or at least, the creditorship is not forced upon him. This, too, was originally religious; the thing, the staff, the parchment to which the right adhered was the representative of the oaths which the person swore, the acceptances that he gave, the curses that followed the breaking of the agreement.

2. *Development of the Law of Obligations*

1. Developed culture requires ethics in legal intercourse, and rejects the standpoint which it formerly tolerated, that one party to an agreement might treat the other deceitfully. Instead of being bound to his word, he becomes bound to the faithfulness expressed in the word. But faithfulness in legal commerce is truthfulness, and it is this that one party to an agreement owes to the other. By this means commerce is

raised to a higher plane, human nature is clarified, and at the same time economic life is promoted; for even if the individual himself profits by deceit, yet this injures and benumbs commerce as a whole: here one man's advantage is the other's disadvantage, and also the disadvantage of the community. Where there can be no confidence, commerce will draw back timidly; wherefore, it is only in the nations that have worked their way up to truthfulness, that economic life has flourished to its full capacity.

2. But the duty of truthfulness does not exclude secrecy, and everyone is entitled to secrecy regarding individual things; provided, these individual things do not themselves become the object of the right. If anyone enters into a contract of service, information regarding his ability to perform the service belongs to the truthfulness of the transaction. All those circumstances, on the contrary, that have caused an individual to enter into any agreement, are separate from the transaction; they are justifiably the secret of the person. Accordingly, legal commerce develops in such a way that all those motives are unimportant to the existence of rights, and that legal consequences take their course with no regard to what external and inner conditions have existed in the parties to the agreement, that have decided them to make the agreement.

3. The reason for preserving this secrecy is a healthy egoism which is one of the chief motive powers of a thriving commerce. Egoistic impulses are much stronger than those of philanthropy, and if we should let the latter alone hold sway, many of humanity's tasks would remain unfulfilled. Therefore, culture must allow a healthy egoism to rule, and the law must not become the upholder of those powers that might benumb and undermine culture. Hence, every party to an agree-

ment has the right to secrecy in respect to his speculation: that is his own peculiar advantage, for the attainment of which he acts. It is his speculation, resting on considerations of the legal relations, and the judgment of men, and it is often more a matter of inner impulse and conviction than of conscious activity of the mind. Thus, for instance, when a man buys wares, because he believes that there is a demand for them in another place, where he can dispose of them with profit; he need not impart this fact to the other party to the agreement, nor need he tell him, if he has received information that would lead one to expect a rise or a drop in the price. And, if someone comes to the conclusion that a certain place would be advantageous for building purposes, and he buys up property with this end in view; he need tell the other party to the agreement neither his reason, nor the fact that he intends to acquire a large tract of land.

The justification of secrecy, as against the duty of truth, is the difficulty encountered in this sphere of law. The doubts that arise in this connection can be decided by assuming that the custom of dealing determines what information may or what may not be expected. Healthy commerce has a very true sense of what one may be expected to impart, and what is so private in its nature that it would be impertinent to ask for it.

If it is a matter of justifiable secrecy, it would even be admissible to defend one's self against the impertinent inquiries of a curious person, and to put him off with prevarications. This would not be an infringement of the truth expected in dealing, such as one is entitled to expect. When the fanatics of truth object to this view, they merely show that as literalists they have failed to perceive the inward significance of human relations.

4. When parties to an agreement enter into relations, according to which one owes the other some performance, the following ethical idea necessarily develops: as long as the performance has not been completed, the obligor is not only bound to the performance, but is also obligated to devote himself to the interests of the other with reference to the future performance. For he must immediately recognize that he is no longer acting for himself, but for another's property, and in regard to another's property he may not act as in his own affairs. This too is an ethical principle: one may act as he wills as to himself, but he must deal with the other party to an agreement consistently and considerately.

This ethical principle will also, of course, considerably advance economics, for the more confidently consideration may be expected in obligatory relations, the more certain can one be of performance, and the more possible does it become to make the expected performance the basis of speculations.

5. As regards the care element in obligatory relations, the law has certainly had to concede and to add something. The highest care cannot always be exacted; and here two points of view come under consideration which are rooted in human nature, and therefore almost universally control our cultural rights.

(*a*) Whoever promises liberalities to another must be more leniently treated as regards his care in carrying them out; for if he were not liberal, the other would receive nothing. Now, we can still keep the promise of a gift and the performance of that promise separate, and conclude that the fulfillment of the promise is the fulfillment of a duty, not a new gift. Thus, we might conclude, that with the promise of the gift the giver ceases to be a giver, and thenceforward must be responsible for utmost diligence to perform. But this

conclusion would be monstrous. It is incorrect to say that from the moment when the donor takes the obligation upon himself, he is no longer capable of generosity; for the whole is a unity which is merely divided into two parts by juristic technic. Hence, mature legal consciousness will come to treat the giver, even after his promise, in accordance with the principles of generosity; and here the standpoint follows as a matter of course — that as regards the duty of care to perform, the giver must be treated with greater indulgence, and must be called to account only if he is guilty of actual unreasonableness. The same applies to all liberalities, especially to unremunerated loans.

(*b*) According to a second point of view, where the obligatory relations are between members of a family, the view is maintained, not that one interest is coldly opposed to the other, but that each one acts and strives for the common interest and for the whole. But here, each must be allowed to operate in his own way and manner. The family cannot regard the other member of the family as a stranger, and cannot expect him to be different from what he is by nature and character; hence, it follows, that in such cases, a liability that exceeds the measure of what a man is in the habit of performing in his own concerns does not conform to the conditions of life. For a man can only be required to deny his own ego when he acts for outside interests; not when he is active in the interests of the family. Accordingly, there arises the so-called liability for *culpa in concreto* between man and wife, between father and child, formerly also between guardian and ward; and there is also the *culpa in concreto* in partnership relations, for these had their origin in the family; partnerships were formerly always composed of family members, or persons who were taken into the

family. Even today, the partnership relation bears this character, and it would be lamentable if the particular loyalty, confidence, and the intimacy in dealing among the partners should decline: a partnership that is not so constituted contains the germs of dissolution.

(*c*) It is also important for our problem to note that perfect contract relations only later became such by growing out of actual relations of fact. Special mention may be made of agreements for the custody of movable things. It often happened that one person deposited some object, which he could not use at the moment, with another, by his consent. The idea originally was not that this other should take care of the object, but merely that he should allow it to remain, and should refrain from appropriating it to his own use. Only gradually did this develop into the duty of guarding the thing, and taking the necessary steps to preserve it. This was especially perceptible where animals were concerned, which had to be fed and cared for, and also in the case of plants, etc. Thus, gradually, the contract of bailment developed, but, as is comprehensible, the duty of the keeper still remained a light one, and he was not held liable to the utmost care.

(*d*) Often, however, in the history of the law, the tendency has also been clearly felt to make the liability of the debtor heavier. Such tendencies are connected with the economic situation, and have different meanings. When, by agreement, a man takes a certain risk, he seeks to compensate himself for this by an equivalent in the performance rendered in return; and this equivalent will be a kind of insurance premium which he either receives himself or gives to another who takes over the insurance of the risk. But these are ideas that did not come until later, after the insurance idea had gained a greater importance.

Such a liability is especially suited to large undertakings which, in consequence of their capital, feel the weight of such a burden less than would individuals, and which may therefore be regarded as called upon to aid in the equalization of human relations; this applies in particular to railways and other large undertakings.

On the other hand, the extension of liability may also be intended to prevent various excuses on the part of the debtor who is apt to take chances and then deny his carelessness. In other words, such a rule may be one of those intended to coarsen the finer development of legal relations, when it is recognized that this finer development is unpractical, and must fail of its object by reason of the incompleteness of human knowledge. (See above, p. 30.)

Thus the change has been largely introduced that a debtor is liable not for negligence alone, but generally, and can offer perhaps no excuse but *vis major*.

Whether the one method or the other is better depends mainly on circumstances; in particular, on whether it is easy or difficult to prove absence of fault, whether the heavier burden that is laid on the debtor can justly be compensated by an equivalent, whether security is possible or not, etc. A system that lies between the two allows the debtor in such cases to take a heavier liability upon himself, but only up to a certain amount so that he may not be unduly burdened.

3. *Extinction of Debts*

1. Obligations may be continuous; as, for instance, an obligation to refrain from something, or an obligation requiring repeated acts; for instance, the payment of a continuing annuity; or they may be temporary, so that they cease with a momentary act which represents just what is essential in the liability for the debt: the

obligatory relation then dies at its zenith; it dies when what it was intended to attain for humanity has been accomplished.

The obligation then is prepared to expire; it is extinguished by satisfaction, and especially by fulfillment, that is, by that performance which is the object of the obligatory relation. The theory of these performances is one of the most interesting parts of civil law, but cannot be further dealt with here. From the standpoint of the philosophy of law only the following points need be emphasized:

(*a*) Fulfillment must conform to the obligatory relation. It is inadmissible for the debtor to force something else on the creditor in place of what he owes. But, of course, in individual cases the obligatory relation may be such that the law gives the debtor the choice of fulfilling the obligation by one thing or another; for instance, if the debtor is to deliver money the law may allow him to deliver the value of the money instead; in that case the legal system is so constituted that a money obligation is not purely a money obligation. It was thus everywhere, before payment in kind gave way entirely to payment in money.

(*b*) Fulfillment raises the opportunity to make an assignment of performance to a third person, the creditor giving the debtor instructions to pay another and the debtor conforming to them.

(*c*) Under some circumstances, the obligatory relation must necessarily become extinguished if its purpose is completely fulfilled, or if it has become purposeless; for instance, if the person who is to receive payment receives it through the gift of another.[6]

2. The method of fulfilling an obligation was originally unalterably determined by the nature of the

[6] "Lehrbuch des bürger. Rechts," II, p. 220.

obligation. Here, too, the mind of man has gradually begun to be active: this gives rise to:

(*a*) The agreement of fulfillment according to which the parties agree that something that is not fulfillment shall serve as fulfillment.

(*b*) The direction, according to which the person who is to receive payment is changed, and it is determined, by the declaration of the creditor, that payment made to another shall have the same result as payment made to the creditor. (p. 151.)

(*c*) The arrangement that proceeds from an adjustment of accounts with its further ramifications, running accounts, etc. In this connection reference should be made to the "Lehrbuch des bürgerlichen Rechts," II, p. 185.

4. *Securities*

(*a*) Pledge.

1. The pledge may be interpreted in two ways, and has taken on two fundamentally different forms in the legal systems of the nations. The object of the pledge may serve to satisfy a debt, inasmuch as the creditor's claim is settled with it. As yet, however, nothing final has occurred; for the debtor still has the power to redeem the pledge, and until the question of redemption is settled, the matter remains pending; but this does not prevent the pledged object from amounting to a satisfaction. It is so, if it is the aim of the pledge that the thing shall by the operation of time, become the property of the creditor. The change of ownership takes place as soon as the redemption term has passed. The pledge relation may, however, assume the opposite form, the object becoming immediately the property of the creditor, and the redemption being considered an act of re-purchase. The matter is developed still somewhat differently if, on the expiration of the term of redemption, the

object is, indeed, to be kept by the creditor, but that he is to make settlement with the debtor for its surplus value. In this case, the delivery of the pledge is, everywhere, the satisfaction of the claim.

2. This form leads to the second fundamental interpretation; according to which the delivery of the pledge is not in itself satisfaction, but merely the means of satisfaction. If the creditor turns the pledge into money and pays himself with it, the idea is that the delivery of the pledge does not discharge the debt, but that only the acquisition of the money obtained from the pledge operates as a discharge. Whereas, according to the previous view, the intrinsic value of the pledged object covers the creditor, so that afterwards, at the most, an equalization has to be made, this interpretation requires a sale, before there is satisfaction.

This latter interpretation has become so predominant, and is so general in modern law, that we scarcely ever think of the former interpretation until studies of comparative law remind us of it. It was, indeed, distinctly present in the Germanic law, but it was not found possible to include it under a larger principle.

3. The practical difference between the two views is this: according to the principle of satisfaction, the creditor at once takes the risk, and if the thing is destroyed, he cannot make a second demand on the debtor; for the surrender of the thing has settled his claim, just as payment would have done. The thing is the creditor's satisfaction; and, if, after being taken it is destroyed, he must of course bear this loss; just as he would the loss of money that the debtor had paid him.

The second view is entirely different; for even though the creditor holds the means of satisfying himself, yet he has not the satisfaction itself. Thus, if the means perishes, the debtor must give him another means of

satisfaction. The possibility of satisfaction is not the same as satisfaction.

At most it may be asserted that the creditor to whom the pledged object is delivered is the depositary of the pledge, and is liable as such; and this liability can then be more or less extended, according to whether he is regarded as a remunerated or unremunerated depositary. It accords with the nature of the transaction to regard him as a remunerated depositary, as the delivery of the pledge is made in his interest.

Although today this last standpoint is universal, a few fragments of the former principle have remained, as, for instance, the principle of our bankruptcy law, that whoever has a pledge cannot bring forward his whole claim at the meeting of the creditors, but only the amount not covered by the pledge; and, also, the principle in civil procedure, that whoever has a pledge right cannot proceed against the debtor in as far as the pledged object affords him satisfaction, etc.

4. A second important division of pledges is into pledges delivered into possession (*Besitzpfand*), and pledges not delivered into possession (*Nichtbesitzpfand*). In the first case, the pledge is delivered into the creditor's keeping, so that he is not merely legally but actually secured. In the latter, the debtor retains possession of the thing, and the creditor is more or less dependent on his honesty.

It is easy to understand that, in early times, the pledge was commonly delivered into the creditor's keeping, because the measures of the law were weak, and confidence in dealing was not yet firmly established. This arrangement was also desirable, because the transaction was then made public to a certain extent.

On the other hand, it has the great disadvantage that the debtor is thus deprived of the use of the thing:

this may possibly bring his business to a complete standstill. Take, for instance, the case of agricultural implements given in pledge, without which the work of the farm cannot be carried on.

And this is not only a disadvantage to the debtor, but a universal economic disadvantage; for, as the debtor cannot, and as the creditor will not, use the thing — and the latter is, perhaps, unable to use it in most cases — it is impossible for it to be used at all, and thus humanity is deprived of the service of often very important wealth.

5. This can be remedied by allowing the creditor to use the thing, thus making it a usufructuary pledge (*Nutzpfand*). This presupposes, to be sure, that the creditor has a business or establishment in which the pledge can be used, and this requisite obstructs one of the main advantages of the pledge: the abstract nature of its value. Nevertheless, in earlier times, when all the subjects of the State were very similarly engaged, this was more easily accomplished; and, in particular, where agriculture predominates, it is very appropriate, if a pledge consists of land that it be given over to the use of the creditor; in which case, of course, the use of his own land is simply extended to include the pledged property.

This usufructuary pledge has played a great part, and has served to make money fruitful, and to weaken somewhat the prohibition of taking interest: the creditor had the use of the thing, without the profits of this use being deducted from his capital, or only a part was deducted, and the remainder compensated him for being deprived of his capital. (Compare p. 171 (4).)

This form of the pledge is less practical with movable things; at least, when there is a great difference between the occupations or establishments of individuals, so

that it is more or less a chance whether the creditor can make use of the thing pledged.

6. All these circumstances have contributed to bring about an arrangement whereby the debtor retains possession of the pledge, and the creditor is not actually but only legally secured. When the State has attained a firm development so that the faithful conduct of the debtor is legally assured, no great obstacles will oppose this arrangement; hence it developed in the Orient, in Greece and Rome, as well as in Germany. It is the Roman *hypotheca*, and the newer principle of German law.

Nevertheless this form has its considerable disadvantages, because a man's financial condition is thus more hidden than formerly. No one knows what is pledged and what is not, and thus a wild chaos of legal relations arises, from which escape is only possible by the adoption of the principle, that when a person acquires a pledged thing in good faith it is freed from the pledge. But the financial condition of the debtor also becomes more and more uncertain. The man who is supposed to be well off is perhaps already overburdened with pledges; one evil involves another, and as each creditor seeks to cover himself as far as possible, each will endeavor to obtain a pledge of the debtor's whole property; in this way the economic relations become more and more entangled.

The attempt was made to remedy this by publicity, so that everyone could see from a public record how the debtor's credit stood. This proved very effective in respect to land; hence the publication of mortgages (*Hypotheken*) was adopted in Egypt, Greece, and later in Germany and in all Germanic countries. It has not been found as practical with movable things, however. Two systems have been used, either the system of keep-

ing public books, which, however, can only suffice where movables of a certain durability are concerned, such as agricultural, or manufacturing implements; or the system of "marking" pledge-objects by sealing, etc.

Another disadvantage that arises when the pledge remains in the debtor's possession cannot, however, be avoided in this way: this arrangement furthers the debtor's recklessness, and he is led to overstrain his credit, and pledge everything that can be pledged, as he suffers no inconvenience at the moment, and the "day of reckoning" does not come till afterwards.

7. The pledge is not now turned into money by being first given into the creditor's possession, but is sold, and the proceeds are given to the creditor, or divided among them, if there are more than one, according to their priority. The manner of sale, whether by private sale or public auction, is a matter of legal technic and belongs to the civil law.

8. A later development displays the following tendency: A distinction may be made between the original thing and the thing as it exists after an improvement has been made upon it. The improvement (*Amelioration*) can only become separate property when it is actually separable; as, for instance, a structure built on a piece of land. But, if, for example, the land has gained in value owing to irrigation, or drainage, the improvement cannot be distinguished from the rest; in this case, the improvement is not an addition but an internal alteration. On the other hand, security rights (*Wertrechte*) may attach to the improvement, though not in such manner that the right of security embraces a component part of the thing, while another component part remains unaffected; but in such a way that in the exercise of the right of security, that part of the value which corresponds to the improvement, falls to the holder

of the security. This is the case with mortgages on improvements (*Amelioration shypotheken*), and they exemplify the great advantages of security rights which are much more mobile, and conform much better to the interests of humanity, than the more rigid rights of servitude.

(*b*) Suretyship.

1. Suretyship originally meant the giving of a hostage, the debtor being released by a new debtor, either at once or when the need arose. Not until later did suretyship change its character so that it implied an addition to the debtor's credit instead of an attachment of the person.

The principle of giving pledge of a hostage is based on the idea of representability, one person being considered as fitted as another to assume the liability for the debt and thus to satisfy the creditor. This applied not only to obligatory relations of an economic kind, but also to penal obligations, a surety taking the place of the guilty subject. Here, too, we find the idea of equivalence, resting on the view which at that time dominated criminal justice, and did not necessarily connect the punishment with the perpetrator, but even extended it to other persons.

2. To act as surety was considered the special duty of the members of the family; this was an outgrowth of the earlier idea of the collective liability of the family. While formerly, by virtue of the law, the family was liable for the individual, the later form reversed this, so that the individual took upon himself the liability for other members of his family.

3. Suretyship does not, of course, aim at subjecting the surety to the debtor's difficulties; rather, it is understood that he is to be released by the debtor's doing what

is necessary to satisfy the creditor either economically or by undergoing the penalty. Not to protect the surety against liability was a reprehensible breach of faith, and whoever was guilty of it not only incurred the blame of society, but the surety was allowed to proceed against him rigorously. At first, this so-called recourse developed within the family, and the State paid little attention to it originally; because the family kept order in its own circle, and of its own accord revenged all negligences and failures on the part of its members to perform their duty.

4. Suretyship was a liability of the person. It was not a trade obligation but a personal intervention for another; hence the principle that suretyship expires with the surety; it is not handed on to the heirs.

5. But this leads to serious evils, for the debtor is freed from the creditor by virtue of the suretyship, and then the creditor loses the surety also.

Of necessity, then, the rule developed, that in such cases the debtor must produce a new surety, or must again offer himself, and this brings about a far-reaching change in the institution. As long as obligations existed only for a short time, this condition of affairs either did not occur at all, or had no effect deep enough to influence the institution to any considerable extent. But, when long-continued obligatory relations arose, it was necessary to provide for the creditor in the way mentioned; and this gave rise to the rule, that by procuring a surety the principal debtor is indeed freed, but not completely; he must again become answerable if the guaranty of the surety fails. This conditional, further liability of the debtor gradually grew to be unconditional; and so it came to be that both the debtor and the surety were liable to the creditor — a condition that would have been impossible, accord-

ing to the views held in earlier times; for then the principle was maintained: one debt, one debtor. Gradually the debtor's liability became so conspicuous that some systems of law have forced the surety entirely into the background; so that he is answerable only if the debtor fails in some way to perform. What is called the *beneficium excussionis*, according to which the surety may require that the creditor first proceed against the debtor and resort to the surety only if this attempt is unsuccessful, is a very meager institution and one that discourages credit, for it makes the creditor's security unstable. The security of credit requires not only full, but also easy satisfaction to the creditor; in order that credit may be easily obtainable, it is necessary not only that the creditor be paid, but also that he attain his object quickly and without trouble. Hence the idea, that appeared in Germany in the Middle Ages, that the surety may require the creditor to proceed punctually against the principal debtor, so that the latter may not become insolvent and thus cast the burden on the surety, is entirely at variance with the meaning of the institution and deprives it of a great part of its value. The only proper course, in such a case, is to allow the surety to proceed against the debtor, and to leave it to him, whether he will do so; so that the debtor may be compelled to give the surety security, or to release him (either by finding another surety or in some other way).

6. The institution of suretyship has attained particular importance today, through the fact that sureties often appear for juristic persons and guarantee their obligations; especially is this the case as to members of partnerships of unlimited liability, and with members of co-operative societies. In the latter case, there are serious social objections; wherefore the attempt is made to

lighten the responsibility of such members; it should only be recognized if the society becomes insolvent, and then the individuals should be spared as far as possible. (p. 162 (4).)

(*c*) Joint Liability.

1. The certainty of fulfillment can also be increased by joint liability.

2. Joint liability affords a strong guaranty of performance; not only is all the property of the joint debtors subject to the creditor, and subject to be disposed of if necessary by execution, but even the persons of all the debtors are made subject to him — a remedy of great efficacy in the days when pledge of the person was allowed, but which even now is not without significance. Although the law may have advanced to the point where the body pledge is unknown, yet the personality of the debtor affords a strong guaranty to the creditor, because the debtor's failure to meet his obligations may injure his position in society; so that in any case his personal undertaking is an important security for the fulfillment of an obligation. To this is added the following consideration: in the fulfillment of an obligation, not only the person's wealth and whole position must be taken into account, but also his character and his customary behavior. There are persons who are unaccommodating in their relations to creditors, who are apt to make difficulties for the latter, and feel no pricks of conscience if they fail to fulfill their obligations. Others are conscientious, and look upon it as a matter of honor to be punctual in this respect. Some are quarrelsome, ever ready to find points of disagreement, and thus trouble the creditor, while others are peaceful and give way rather than oppose him.

3. Consequently, it is of a great importance, if the

creditor has several debtors for the same performance, so that he is able not only to make demands on their property and personality, but also to create for himself as great a security as possible, by making use of the different psychic dispositions of the debtors. Hence, it is a fundamental condition for the successful existence of a joint obligatory relation that the creditor should be able to choose which of the debtors he will claim, because, as has been said, not only wealth and position, but character and business methods enter into the question.

4. It is true, however, that a less pronounced kind of joint liability is conceivable, if the personal element should be withdrawn, and only the collective property remain as a guaranty. In such a case, it is reasonable for a debtor to require that the creditor distribute his demand among all the solvent joint debtors; and where the obligation rests upon a large number of persons, for instance as in a co-operative society, this system has a particularly practical significance; as here, the participation of the personality is withdrawn, on the one hand, and, on the other, the collective liability of the individual members overshoots the mark, and may lead to difficulties for the individual, even to his financial ruin. It is suitable in such cases to lessen the collective liability, by distributing the debt among the members who are able to pay.

SECOND DIVISION

THE LAW OF OBLIGATIONS IN DETAIL

FIRST SUBDIVISION

SECTION XVI

BARTER

1. *Barter of Things*

(*a*) Foundations.

1. Barter is based on the idea of equalizing values. A man gives something and receives something in return, and this relation of giving and receiving is not governed by chance; rather, the persons stand in an economic relation to each other, a relation in which values are equalized. The *tertium comperationis* of both acts is the equivalence of their value.

2. The barter value is not the same as the value in use; for it is not the value that is determined by the individual's need, but by the value that is fixed by the social function of the article in general commerce. Under value in this sense, we understand the extent of the economic worth of an article, which is determined by its comparison with other wares and their economic uses. It is incorrect to say (with Marx), that value always corresponds to the labor that the article represents. Value is rather determined by a whole series of social factors: the demand for the article, the effort to obtain it, the greater or lesser frequency with which it is offered for sale, the facility with which it is obtained,

and its greater or lesser rarity, which is by no means only a matter of labor conditions but is rooted in natural circumstances. All these factors will affect value, and will cause the thing — even though it may always represent the same amount of labor — to assume sometimes a greater, sometimes a lesser social importance.

3. It is not only need that is of importance in barter. A number of other, mainly psychic circumstances come under consideration, especially the human love of variety which is strongly developed, particularly in nations that have little self-control and little mental culture. Men grow tired even of what is best and most beautiful and want something else. Then, too, the psychic needs that are esthetic or partly esthetic in their nature have to be considered. People want what dazzles and attracts them, what appeals at the time to their sense of beauty, or rather their mental aspirations. The sudden, unaccountable popularity of a thing, the immeasurable attraction that some article has for people, often plays a great part.

4. It is a misconception to assert that barter grew out of the division of labor. The division of labor naturally increased the need of barter; for whereas, formerly, it might have been possible for the individual to satisfy his own needs and longings himself, it ceased to be so as soon as the individual was limited to the production of certain definite wares. It is true only, that while otherwise the tendency favoring barter transactions was based more or less on chance, the whole system of economic production made it essential. (Compare p. 129.)

5. The backbone of barter is, as has been said, the equalization of value. This idea of equalization increases, as soon as articles are produced which are not regarded as a means of satisfying personal needs, but

are intended to represent values. While, otherwise, value is an x which is contained invisibly in the objects a and b, value now, at least on one side, appears openly. It is no longer an x but a certain quantity, v, and the question of value which otherwise comes under consideration in respect to both the objects a and b (because in both value lies invisibly dormant), need now be considered only in connection with the article a, since the exchange value of the value-representative, v, is given, representing clearly and unmistakably to everyone a definite value. In this way money originates. This not only means great progress in the valuation of things, it being possible to reduce the value of everything to a money unity, just as when we bring all fractions under one denominator;[1] but a second advantage is involved, — an advantage with the most momentous consequences, — that the value-representative, money, is not, at the same time, a means of satisfying any one special human purpose. If one who wishes to dispose of article a, wants to obtain article b, he must, in a period in which barter is the only means of commerce, seek a person who wants article a, and at the same time has article b to dispose of. In other words, the transaction as regards a and b depends upon chance — chance on both sides, in fact — for the sale can only take place if one individual wishes to dispose of a and obtain b, and the other wishes to obtain a and dispose of b. This is, of course, a powerful obstacle, and not only imposes difficult conditions on the barter transaction, but necessitates a great deal of human effort, till finally, an opportunity is found that combines both requirements.

It becomes necessary to eliminate this chance, and one of the principal means of accomplishing this is the introduction of money; for if one wishes to dispose of

[1] "Einführung in die Rechtswissenschaft," p. 69.

article *a* and obtain article *b*, he has only to find a person who wants *a*, and will give him the value-representative, money, for it. With this value-representative, he can now seek some one else who wishes to dispose of article *b*, and in this way he succeeds in acquiring article *b* instead of the article *a* which he possessed. Here the contingency is only on one side; the sole chance is, that some one wishes to acquire article *a*, and further that some one else wishes to dispose of article *b*. Separated in this way, the contingency is much more easily overcome than when it is combined. If the simple chance occurs in perhaps fifty per cent of the cases, the combined chance occurs in only about ten per cent of the instances.

6. In order that money may come into use, things must enter into commerce that are most generally used, and which are fairly uniform in value. When this is the case, the custom will gradually grow up of giving an article for such an article of general use, which is much easier to find and circulates more freely in commerce than any other. When it has become usual, instead of satisfying one's wants directly by barter, to seek first for such an article, and then to find the man who wishes to dispose of the thing desired, the peculiar use of the article will be less and less considered, and it will become more and more a representative of value until finally it comes to be regarded only in the latter aspect. Among peoples that live by hunting, such articles are chiefly animals' pelts, which everyone needs; among cattle-raising peoples, cattle. Different kinds of animals acquire a general value-significance; small cattle (calves, sheep, goats, and pigs) represent a certain value, large cattle another; and, as medium sized animals are the standard, the size of the individual animals does not matter. This is made especially easy among pastoral tribes,

by the fact that one shepherd has all the animals of the place in his keeping; so that the transfer can be made simply by re-branding those that have changed hands.

The disadvantages of using animals in this way appear as soon as the institution of money becomes more developed; for then money must not only be a representative of value, but also a means of keeping or storing value, and a means of dividing it. This presupposes that the articles have a certain permanency, and do not decay after a time; also that they do not require constant attention, as is the case with animals. Thus, instead of pelts or animals, leather money comes to be used. Hence, also, some nations use shells and other permanent objects of value. But it should also be possible to represent different degrees of value, from the smallest to the greatest, for if the objects *a*, *b*, *c*, having different degrees of value, are exchanged, the value-representative must be such that the value of *a*, *b*, *c*, can be represented. This is only possible if it is divisible, which is not the case with animals, but is with leather and shells, inasmuch as a larger or smaller number can be strung together.

But metals have all these qualities in a much higher degree; hence, it soon occurs to peoples that have metals to give up all other value-representatives, and to use only metallic money; ore, of course, at first, and then, when the production of gold and silver is sufficiently developed, these metals too.

The division of value, when metals are used, presupposes of course that weighing scales are always at hand, on which the quantity can be weighed that corresponds to the value; until, at last, the new idea arises of marking on a piece of metal the amount of metal it contains, and in such a way that it is universally credited. Thus coined money originates. Coined money has two

qualities: it is a value-representative in itself, and it is a value representative with a publicly announced metal content.

In this way, the public offices that mark the pieces of metal gain a tremendous influence over money. Soon the idea of allowing semblance to take the place of reality appears more and more persistently. The State begins to make out false certificates, to coin or mint money, that is, to stamp the coin with a higher value than the true value of the piece of money. If this is done secretly, and in order to deceive the people, it is immoral and leads to the destruction of public confidence. Whenever it has been done in this way, it has always ended in a period of confusion and disorder. It is entirely different, however, when the semblance is not intended to deceive, when the stamp is not supposed to convey the idea that the coin contains a certain amount of metal, but only that it is to be used as if it contained that amount. In this way fractional currency and paper money arise.

7. Even after the introduction of money one element of contingency still remains, and this element the intermediaries of commerce seek to eliminate as far as possible. This kind of commerce consists of acquiring goods not for one's own use but in the expectation that others will need them. They are kept in stock on the chance of their being wanted. The result of this is that if some one wishes to sell article *a*, it is not necessary for him to find a person who needs this article; he has merely to go to the middleman: and similarly, if he wishes to buy the article *b*, he need not seek a person who happens to have such an article, and is willing to sell it; he need only apply to the middleman who, without himself being in need of any special article, disposes of the object *b* for money. The progress of culture can be

perceived in this process, inasmuch as chance is eliminated as far as possible, and man overcomes the obstacles that nature and society throw in his path.

(*b*) The Evolution of Barter.

1. At first all barter transactions were promptly and immediately completed, particularly barter between different tribes, which developed as private commerce. But, even among members of the same tribe, a thing was given for a thing received at the time. To give something for a thing that is to be received in the future presupposes an economic mind that is directed toward the future, which primitive peoples did not possess, and which some peoples never attain. (p. 28 (2).) When sale takes the place of barter, the idea of credit will arise much more easily; though, even then, the mind is not able to renounce the idea of a bargain for ready money. Thus, if a man wishes to buy something and pay for it later, he does it indirectly by paying the price "constructively," and then receiving it again as a loan. By this method two transactions are combined that gradually become one: the "constructive" payment is no longer taken into account, and the return of the loan is treated as a part of the original transaction.

2. Barter has accomplished its object when each person not only possesses his goods, but owns them. The mere acquisition of possession will not serve. The man who does not own the things he possesses cannot dispose of them, and his relation to them is not the mastery that the individual should obtain over natural objects. Hence, it naturally follows, that as long as he does not own the goods, the object of the barter has not been accomplished. Moreover, the acquisition of alien things is an encroachment on alien property, and is therefore ethically to be severely blamed: the syste-

matic purchase of alien things would be nothing but the continued appropriation of others' property, and would exhaust the marrow of ownership. It follows that barter is ethical only when it is so treated that one person acquires ownership and the other refuses either to give or take goods of another. Hence, if the vender has unknowingly sold something belonging to another, he cannot be required to deliver it, in spite of his agreement; for he can declare that he will not continue the dishonest course, but intends to return the article to its owner.[8]

It is quite another matter, of course, if both parties agree about a thing, on the supposition, and in the expectation, that the owner will consent to its sale.

2. *Barter of Value.* — *Interest*

1. Just as in the law of things there is a right of security as well as a right of servitude, so too in the law of obligations there is a barter of value (*Werttausch*), that is to say, a value, a money value being given for a money value. But as value and value are naturally equivalent, the exchange can only take place with a difference in time: one and the same value takes on a different significance when present value and future value stand opposite each other. Thus, all business that has to do only with money values is a business that exchanges a present for a future value.

2. In the closest relation to the use of capital stands the theory of interest. In the life of primitive peoples, where the production of value is generally agricultural and little free or available capital is found, the loan is

[8] The fact that Roman law taught the opposite is a monstrosity to be understood in the light of history. It is less comprehensible that, in spite of my explanations, its justification was attempted from a legal philosophical standpoint. Compare "Archiv f. bürgerl. Recht," Vol. XXX, p. 164, also my "Gesammelte Abhandlungen," p. 224 (respectively 1883 and 1877).

nearly always consumable in its nature: it is given either in moments of dire need, or in moments of recklessness. In this case, it is comprehensible if it is thought to be hard if neighbors and members of the same tribe require the return not only of the capital, but of something more as well. A man should aid his neighbor, and not make his necessity a source of profit; and if he abets his recklessness, the matter should be so arranged that he suffers by it as little as possible. This is the origin of the rule that forbids the taking of interest. The prohibition accords with the times in which the use of free capital was rare.

3. But it continued in later periods, and in this, two motives were concerned. First, a speculative one, the idea that the future is still a zero, and cannot be made the object of agreements; something that is now present should not be given for something that thus belongs to the future. This idea, which has already been discussed on p. 28, has been carried out by the nations even in regard to interest; and they have assumed, that in this respect, trading with future values is still less admissible than where physical products are concerned. For, even if free capital brings advantages, yet these are not as tangible as products; they are profits that appear sometimes in one way, sometimes in another; profits that are difficult to separate from the results of work and the success of speculation. Hence, they are less the subject of agreements than are future physical products; and, thus, the idea of the sterility of money develops, an idea which the Scholastics of the Middle Ages spun out to great lengths.

4. An additional motive was the inherent impulse to increase individual activity, and to prevent the individual from retiring with the proceeds of his principal. In this respect, the prohibition of taking interest

long exercised a favorable influence. Anyone who has available capital should seek to make use of it himself, in agriculture, industry, or trade; the division between capital and labor that exists today would have been impossible at that time. Whoever wanted to live on his capital was obliged to pay some attention to its employment, and could not simply draw the interest on it without considering what was being done with it. One kind of investment was the usufructuary pledge, the capitalist taking a piece of land into his possession in return for money lent. He was allowed to use the proceeds of the land, as these were not interest but the results of the use of the land, and for this land he had given his capital. But this method gradually fell under suspicion, and it was difficult to refute the idea, that the capitalist should really credit the proceeds of this land to his capital; and so it happened, that in time even this method of applying capital was declared to be usury, and it was looked upon as if interest were taken instead of merely what the land produced. (Compare p. 155 (5)).

Another transaction of this kind, was the purchase of an annuity (*Rentenkauf*), which consisted in a man's receiving for his capital a perpetual income from a piece of land. The capitalist might not demand the return of his money, but the debtor, on the contrary, was allowed to redeem the sums paid as part of the annuity. These sums were not regarded as interest, because a capital debt (*Hauptgutschuld*) was necessary to a debt that bore interest. That there was much disapproval of this transaction is easy to understand.

These two arrangements made it possible to circumvent the prohibition against interest, though not entirely, for after all, the usufructuary pledge creditor was obliged to occupy himself with the cultivation of the soil, and whoever lent his capital for a perpetual

annuity could not prosper unless he kept an eye on the man who paid the annuity and the condition of his land. It was sometimes necessary for him to provide for the further cultivation of the land, so that he might not suffer himself.

5. In trade, too, the capitalist had to take part in the business, if he wanted his money to be productive. But it was possible for him to have an associate who performed most of the active duties, so that he was little more than a supervising spectator. This is the form of partnership (*Kommenda-Geschäft*) which developed equally in the Orient and in the Occident, and by which a capitalist provided a man engaged in commerce with the opportunity of gaining money in an agreement for a division of the profits. Thus, the partnership relation was a deviation from the rule, and it was possible to draw proceeds from capital, even if the economic labor was left to some one else. It was, of course, advisable for the capitalist to exercise a certain amount of supervision and care in the matter; and even today, a man who invests his fortune in stocks is not alive to his interests if he pays no attention whatever to the business, and does not at least take part in the annual meeting, or in some other way acquaint himself with the manner in which the business is carried on.

6. This necessity of combining labor and care with capital, in order to be able to draw income from it, is characteristic of certain periods. With a people that has to be trained to regular occupation, it helps to develop the inclination to labor, and prevents the individual from being overwhelmed by the tide of profit, and working only until he can retire and live on the interest of his capital. This is all changed as soon as the acquisitive instinct is so far developed that even the capitalist wants to have more and more, and seeks to heap up treasures. However much Stoic philosophy may despise

such a course, however strongly it may be represented to the individual, that he will achieve more by moderating his desire for acquisition, the striving for gain will still continue, and the ambition to outdo someone else will rule. The result will be, perhaps, feverish haste and rush, but it will also be an impulse to use the earth's forces in all directions, and to obtain more and more mastery over nature. The mastery of nature is the source of acquisition; for nature is the goddess who pours the fruits of industry into our laps.

7. At this point, the exchange of capital becomes of the greatest importance; because now the first concern is that capital should reach the person who can do the most with it, and this exchange of capital presupposes, of course, the charging of interest; for, whoever dispenses with money, only to receive it back again after a time, will find this no profitable undertaking. Philanthropy may indeed lead to this, but philanthropy is generally a defective spring, not to be compared to the tremendous driving power of egoism; hence, everything that promotes healthy egoism must be recognized to this extent as also promotive of culture, and this includes the charging of interest. Therefore, among all industrial peoples, it has proved necessary to allow the taking of interest; and this interdiction of interest was either directly violated, or circumvented, in every possible way; it had been outlived and could no longer exist.

One other point of view contributed to the abolition of the interest prohibition. The speculative assertion that money was unfruitful was met by the statement, that when a man has to do without his capital for a time he suffers damage; hence, it is only just that he should receive compensation. So it followed, that even though interest was unjustified from the borrower's point of view, it was yet justified from the lender's

standpoint; for he cannot be required to do without his money, and without compensation renounce the profits that it might bring him. Thus, even the Canonists have long recognized, at least conditionally, the admissibility of interest; and, today, there is no longer any doubt about it, even in ecclesiastical circles.

8. In the lives of nations, a system frequently develops according to which legal rates of interest are established. This is not an isolated phenomenon; in a similar way, certain rates are determined for the purchase of provisions, for contracts of service, and other things. The idea that underlies all this is, that when commerce does not regulate itself, it must be regulated by definite rules; so that no one can take advantage of another's necessitous condition, need of provisions, or of employment, and thus introduce needless contingencies into economic life. It is the same as regards money; for, it was long before competition among those who granted credit forced the price of credit down to a just basis. It was not until then that a certain average current interest arose, which of itself became a standard, and helped would-be borrowers in acute situations and difficulties.

Such conditions in fact lasted very long; hence it is comprehensible that the establishment of a rate of interest became widespread and has continued for centuries. Nor are we concerned here with the absurdities that have prevailed, or periods of economic ignorance, but with definite conditions of human culture through which the nations had to pass, and whose peculiar needs required peculiar legal forms.

3. *Commerce in Risks*

1. It was a stroke of genius in Germanic law to provide for a commerce in risks, to treat dangers as objects to be dealt with in business. The risk that one man bears

can be taken over by another who receives something in return. That in itself would be merely an ordinary barter transaction; but the ingenious treatment of the matter consists in this, that risks in the mass are entirely different from an isolated risk assumed by an individual. The individual has to bear in mind, that the catastrophe, if it takes place, means his utter ruin. In reckoning with masses, however, the risk is a balanced one; because only one or another of many dangers regularly occurs; so that whoever takes upon himself the risks of mass commerce can be fairly sure that he will have to meet only a limited percentage of them. Now, all the individuals who transfer their risks to him will be prepared to pay an appropriate equivalent; and in most cases this equivalent will be pure gain to the man who insures, and only in a few cases will it be necessary for him to pay. The consequence is, that for a relatively limited performance, he is able to undertake all these insurances. In other words, the fact that of all risks only a limited percentage lead to misfortunes, thus benefits the individual; whereas, otherwise, this principle would be applicable only in mass commerce. The whole idea of insurance has made a tremendous advance in our day, and it is one of the cornerstones of modern culture; for insurance lends stability to all things; if not to their existence, still to their value, which they would otherwise completely lack. The result will naturally be greater financial steadiness, greater certainty in speculation, healthier conditions generally, and the possibility of devoting one's self entirely to the aims and purposes of humanity.

2. A magnificent further development of the idea has made it possible to include also death risks, with all that that involves, to provide for bereaved relatives, to keep money productive that would otherwise be tied

up for the family's future benefit, and thus to make family life more stable and secure. We now have, moreover, an abundance of accident and liability insurance enterprises which make it possible to endure the dangers and hazards of modern life, and to take upon one's self the liability for third persons and to compensate injuries inflicted by those in our service who would not themselves be able to make the damage good.

4. *Commerce in Service*

1. In primitive times, only service by slaves and trade in slaves were known; the idea that service might be performed by free men was remote. Probably the fluctuating and varying needs of agriculture first led to its introduction. Where only intermittent, quick, and temporary service is needed, the idea first arises that it is possible for a man to render service without losing his liberty.

2. The service agreement, that is, the agreement of one free man with another free man to perform certain work, or to deliver the result of certain labor for compensation, belongs to a later period, in which the dignity of labor was recognized, and the workman was not regarded merely as a physical machine, but as a being filled with human aims and serving the interests of civilization. This service agreement has had a great history in the evolution of culture; and its function is especially to raise and hallow labor, and in all respects to make the position of the workman a dignified one. Accordingly, the employer is obliged to see that the workman is spared, as far as possible, all danger to life and limb, health and honor, and the workman has certain fixed rights that cannot be infringed. Hence, the full measure of liberty to make agreements is not admissible, for the reasons given on page 175. Especially, it must be made

possible for the workman to sever the relation whenever circumstances arise which make it impossible for him to continue his service without detriment to his honor and his character as a free man.

3. Still other factors enter into the matter:

(*a*) Thus, in associative service relations, when a larger number of workmen are employed in the same way (in factories and other places); for there the workmen must be granted a certain equality of position; wherefore a certain order must be established, which applies equally to one and all (*Arbeitsordnung*).

(*b*) Just under such conditions, it is advisable to provide for institutions that promote the welfare of the workmen, and form a sort of associative bond among them (sick benefit societies, pension associations, etc.). A fuller exposition of this point belongs to industrial law; the latter forms a good portion of cultural law which was first cultivated in England in the eighteenth and nineteenth centuries, and from there spread into other countries. New life is infused into the service relation by associations of workmen, which leads to their confronting capital as a solid power. They are thus no longer economically the weaker, and, in offering their services, are able themselves to make conditions. It also leads to the co-operative labor contract, to the establishment of tariffs that are binding for the service agreement, and to the treatment of individual workmen as a part of the whole.

This is the step that we have just mounted.

4. If in this way the workman attains a better position, so, too, on the other hand, the vital strength and efficiency of the working classes are raised, and this is a cultural interest of the first rank. A people must be healthy inorder to remain permanently capable.

SECOND SUB-DIVISION

SECTION XVII

PARTNERSHIP

1. A partnership consists of a number of persons who combine capital with capital, capital with labor, or labor with labor, for the accomplishment of common ends. The operations of man's social nature are made apparent here; for what the individual cannot perform, combined forces can accomplish. This is true not only in such a way that the combination of five fortunes accomplishes five times as much as one could, but skilful combination also increases the significance of each contribution progressively; so that the whole is, for instance, not five times, but five times five as effective as one. This is especially the case if work is added to wealth; for by the skilful handling of money, especially by efficient management, forces can be drawn from the whole that otherwise would remain forever dormant. Just as in chemistry the combination of two elements is not to be regarded merely as a sum, but as producing something quite new, so in economic life the combination of capital and labor may create something entirely new and unsuspected. The combination of capital and labor may, indeed, be accomplished in another way, especially by service agreements, whereby the workman subordinates himself to the capitalist; but, if he has a right, not only to a certain wage, but is himself concerned in the success of the venture and has a voice in its management, his attitude toward it will, of course, be entirely different, and he will do his part with much greater intellectual activity.

All this shows the tremendous strength of the partnership. Its weakness lies in this, that many minds work together for one end; and, as they represent different views of life, different temperaments, different kinds of education, the result is often a divided endeavor; for whenever decisions are made, one may decide in one way, one in another, and this may lead to a mischievous conclusion since a partnership is based on unified action.

2. Whether, and to what extent, these obstacles are overcome depends mainly on the character of the people; hence, some nations are better fitted for the partnership than are others. Especially is it necessary that the individuals concerned should be able to renounce their own desires, and their own will, for the good of the whole, and that they should be ready to make such a sacrifice, even when they are convinced of the correctness of their view, so that the partnership may prosper. A second point that comes under consideration is loyalty and honesty. The partnership offers endless opportunities to a man to work for his own advantage at the expense of his associates. In this respect, too, national character is a main factor; and partnerships will thrive best in countries where loyalty and honesty are strongly developed in the people. The achievements of a nation do not depend only on its intellectual gifts, but, also, on qualities of character, and, especially, on those that make it best fitted for co-operation.

3. Fortunately, in earlier times, special historical conditions helped to overcome the weakness of the partnership as an institution. It was formerly an outgrowth of the family and the position that the head of the family enjoyed, his authority, and the esteem in which he was held, quite apart from other social reasons, made it natural that others should follow him, and

bow to his will. The religious element was also of moment; for if a certain member were believed to possess supernatural powers, his decisions, of course, took on an added importance.

On the other hand, much also can be done by education to promote the growth of those virtues that are necessary in social life. Especially is it possible to teach that small things must be sacrified for great acquisitions; and that it is a mistake obstinately to insist on one's own way, when important interests are in question. And as regards loyalty and honesty, national education can and should do a great deal; for in co-operative life, honesty is a virtue on which the institution of partnership is based. The law, of course, can aid in overcoming the weaknesses of the institution: it can be provided, that in cases of disagreement, a third person shall be heard, and that whoever is guilty of fraud in co-operative life shall become an object of public contempt.

4. The promotion of partnership activities is among the first duties of the law, for the partnership develops a number of hidden national forces, and the tremendous financial power that the partnership attains may lead to its excelling everything else in the market of the world and tipping the scales when highly important economic enterprises are in question.

The law, in this connection, must aim especially at a proper valuation of labor; for the chief significance of the partnership is that it adds labor to capital, thus forming a combination that is able to create what capital alone would find impossible. On the other hand, the law must grant the greatest possible freedom in the formation of partnerships; for the conditions of the agreement must be adapted to individual cases, and must conform to the presuppositions of individual life. Any law that prescribes, once for all, in what manner

the members of the partnership must participate, and deprives them of the possibility of determining otherwise, paralyzes the nerve centre of partnership life, and makes many important arrangements impossible.

In addition, the law must not allow these associations to be formed for too long a time; for much that, at first sight, appears to be admissible, later turns out to be detrimental, or quite impossible. The characters of the members often do not become better adapted to one another with time, but rather, after a period of experiment, the members lose either the ability or the inclination to adapt themselves, so that discord is later bound to appear. It may also happen that, on certain occasions, opposing passions and conflicts are so violent that the mutual regard of the members ceases once for all. Hence, unless the legal order desires to limit the existence of the partnership to a short time, it must grant the possibility of giving notice of withdrawal, even in the case of partnerships established for a definite time — that is, of giving notice on justifiable grounds which are judged from case to case.

5. A new idea enters, when it becomes possible for a member to sell his share of the business. This, it is true, appears to be at variance with the idea of the partnership which counts, more or less, on the personality of the members. Yet, there may be associations that put such a value on capital, and at the same time include so many persons, that the changing of several members scarcely comes under consideration. On the other hand, this change is important, in that it makes it possible for some one who wishes to withdraw, to transfer his share to some one who wishes to enter, instead of bringing about a dissolution of the whole. If such changes were frequent, and involved large numbers of members, they might interfere with the steady

development of the association; and, whereas, at first it may have been composed entirely of optimists, it may end in a sullen pessimism. In order to avoid this result, the effective method is often adopted of putting the management into the hands of an able man, or men, and allowing him certain independence of action. The management thus remains the same even if the members change, and it is only necessary for them to express their views and desires at the regular or annual meetings. It is possible for them sharply to oppose the management only if they are able to set up a different practical leadership, but this is usually difficult. Hence, in spite of the changes in membership, the equilibrium of the association is generally maintained.

The model example of this kind of association is the stock company, an institution whose rise throws everything else into the shade, and with whose financial power the world, one might say, can be conquered.

Of course, there are dangers connected with this kind of company too, and these are especially that the stocks may be improperly used for honest or dishonest speculation, or that the management may be inefficient or dishonorable. In this regard, it is the duty of the law to support, as far as possible, the form of the company, on the one side, and, on the other, to take precautionary measures to prevent abuses; for instance, by making the incorporators responsible, by public supervision, etc.

THIRD SUB-DIVISION

SECTION XVIII

GIFTS

1. Gifts, in the sense in which we understand the word, were primitively unknown to mankind. The participation of third persons in individual goods does indeed occur even in the lowest stages of culture, and hospitality, in particular, is a very ancient institution.[9] But this was not based on the ethical idea of giving; it was merely a consequence of collective conditions and the idea of communal life. Men did not grasp the concept of individual ownership as in our day; hence, the bestowal of goods on others cannot be interpreted as a giving. The goods belonged to all, and if they were more accessible to one, and others participated in them only in a secondary way, yet this was an actual relation that was certainly not understood as meaning that the others were entirely excluded. Hence, the bestowal of goods upon a third person could not be regarded as a breaking off of the rights of the owner.

2. Gifts do indeed occur among primitive tribes, but they have an entirely different meaning. They are based on the desire for change, and if a man gives something, he merely declares in this way that he wants something else from the recipient. This is not carried out in the definite form of barter, but only in the certain expectation of a return gift; though the expectation is fairly well understood, and even though the article desired is indicated. Hence, giving among primitive peoples is a

[9] And not an invention of the Phœnicians as *Ihering* assumed — a positively fantastic doctrine showing complete ignorance of primitive peoples.

very suggestive performance, and the recipient of the gift is not in an especially happy position; he is forced into a situation in which he must choose one of two alternatives. If he does not make a gift in return, the original giver finally demands his gift back again. Therefore we find the idea current among all peoples, that a gift may be recalled, and that the right of recall does not expire until some return has been made,—an idea that was later circumvented by giving in return some insignificant article such as an old hat, glove, or other worn-out article of clothing. This institution is most pronounced in the code of the Longobards, where the return gift is called "Laungild." But also among other peoples the same thing is found.

3. The return gift is often of an intangible nature, and the original gift is not made for the purpose of obtaining some object in return, but in order to procure the recipient's services or favor. Thus, eventually, giving comes to be recognized as a one-sided act. This is shown especially in gifts made to the Divinity, to the temple; for, in this case, the "Laungild" consists of the favorable attitude of heaven, and in all the good that is expected from above. Thus, the leap is taken to the ethical basis; for if only the other's attitude is taken into consideration, and the giver finds his satisfaction in this, then the moral element is present. The desire is there to do good to another, to aid him, to ameliorate his condition; for these are the things that arouse his gratitude, and thus the matter passes from the ground of egoism to that of altruism.

4. With this the recall of the gift ceases; the ethical act requires an immediate sacrifice for the other person. In many systems of law, however, the idea appears that unethical feelings on the part of the recipient of the gift entitle the donor to procure satisfaction in some

way, and this may consist in recalling the gift. But this recall must not be confounded with the one that existed in earlier times. The earlier recall was based on the unstable nature of the donation, and on the requirement of a return; while the later recall rests on the unethical feelings of the recipient of the gift. It depends not on the fact that the spirit in which the thing was given was imperfect, but that the recipient transgresses against the amenities of life. Therefore, the claim is one for satisfaction; and in this connection, the principle has further been advanced, that if the donor becomes poor, and the former recipient of his gift does not aid him, he may ask, if not the return of the gift, at least a recompense, in as far as it is necessary in order to aid him.

5. Cases are not rare in which the donor is so generous that he no longer handles his wealth as individual property, but more as if it were common property. This is simply an atavistic relapse into those primitive times when individual ownership was not recognized. It is a type of extravagance, and indeed one of the most pronounced kinds. Other kinds are the outgrowth of an absurdly over-developed idea of personality, or they are based on ideas of abstinence and self-sacrifice, which may be of highly ethical significance, but are always objectionable, when they stand in the way of other ethical duties. Still another kind of extravagance is seen when a man of weak will falls under the influence of others, and, becoming as putty in their hands, squanders his own possessions. The law has been constrained to proceed against this exaggerated generosity in different ways. This may be done by interference with the person and restriction of his capacity to transact business. It may be done by the opposition of the family [restriction regarding the compulsory portion] (*Pflichtteilsbeschränkung*); and by the establishment of certain

formalities that regulate gifts and make the act of giving more difficult, so that the will of the donor is put to the test, and that the donation can only be made with perseverance.

FOURTH SUB-DIVISION

SECTION XIX

COMPENSATION

1. We have already spoken (on p. 89) of the fact that it is often necessary to adjust the relations of life, so that they may be freed from the element of chance, and brought into conformity with the relations favored by the law. The details of this point belong to civil law.

2. Compensation (*Ausgleichung*) for illegal acts first comes under consideration; as whoever, by acting wrongfully has brought about a misadjustment in what has been settled by the usages of the law, is bound to remove this discord, and to re-establish the proper equilibrium. This subject has a connection with the criminal law.

3. We are concerned here with liability for acts of others, and especially with liability for damage inflicted by animals.

The idea that if a man, in pursuance of his occupation, has another person to help him, he must in some respects be answerable for this person, is very old indeed, and was originally rooted in family relations. A helper became a member of the family, or, at least, was included in the family community; hence the head of the family, according to ancient rules, was responsible for him.

When persons came to employ others who were not included in the household, it was but natural that the idea of responsibility for such persons also should arise. The liability may either be absolute, or the employer may be free from liability, if he has chosen his servants with care and watched over them properly. These are the two poles in the treatment of the matter; for the further view, that the master is in no way responsible for his servants, is so unpractical and anti-social, that it need not be more than mentioned. Our law inclines to the second system, but in certain cases has adopted the first.

4. Of special importance, however, is the liability for animals and slaves; this has played a great part in the history of the law and still requires detailed presentation.

5. The liability for damage inflicted by animals grew out of the idea that animals are reasonable beings, responsible for their misdoings, and hence deserving of punishment and correction. All peoples originally followed this principle — very naturally; for the sharply defined difference that our cultural life makes between men and animals was unknown to primitive peoples. They put themselves on the same plane as animals, and regarded the latter as equal to themselves. Therefore, we find animals being sentenced and punished, etc.; and, therefore, if *A*'s beast did *B* an injury, *B* claimed it in order to execute punishment upon it. Instead of doing so, however, he might make use of the animal to work, and this course naturally appeared the more reasonable as soon as his desire for revenge had somewhat subsided.

6. Of course, the original owner of the beast did not always care to be deprived of it in this way: the damage done did not perhaps amount to as much as a third of

the animal's value, hence the principle was naturally evolved, that if the owner of the animal took the liability upon himself, the animal need not be given away nor punishment inflicted upon it. This must have seemed the more acceptable, because it was quite general for one man to take upon himself another's liability, and therefore no objection would arise against redemption of an animal by a sum of money.

7. It is comprehensible that the principle was thus formulated, that the owner must either deliver the animal up or be liable for the damage. This was a rational weakening of the passions of revenge, that were awakened by the activity of the animal; and thus, also, better and more sensible results were obtained, especially, economic results: the animal was spared, and the owner was not deprived of its use. The latter fact was of added value, because, as a rule, the animal was used by him in carrying on his occupation, and served his purposes better than those of another.

Among some peoples, this treatment was modified in the following way: the owner of the animal was held responsible only for a part of the damage; the idea being, that as animals are only half reasonable, it is proper to make the owner responsible for only half of the damage. This was the case in Jewish law.

8. But all these views were applicable, in the long run, only to cases in which the animal acted with special malice; for, if it merely grazed where it found pasture, it could scarcely be said to have acted with evil intent; and even if it were commanded not to strike against its "neighbor," to bite him, or do him any other injury, it could not be supposed that an animal could distinguish between property relations, and that it was due to malevolence, if it grazed in another field than that of its owner.

This led to another principle: in such cases, the animal could not be held answerable, but the keeper, or herder, or owner, was made responsible; because it was said, that he should have looked after the animals better and in this way liability for insufficient care and keeping originated. This, of course, introduced an entirely new idea; for here, not the animal, but the keeper was directly liable for his own act, because he had not exercised the necesary care with animals that might in this way be a menace to the property of another.

9. In time, of course, the idea that the animal itself was liable, necessarily disappeared, when a fundamental distinction between men and animals was made, and it was recognized that only man possessed reason and was responsible. It is culture that has made this sharp dividing line between men and animals, a process that was unheard of in primitive times, and, even now, is not easily understood by the lower classes. From then on, two methods of treatment were possible. Either the owner was held accountable only in case of offense, in accordance with the last mentioned principles; or he was held liable for the animal in any case on the ground that whoever keeps such a dangerous creature must be responsible for it. All justification for requiring the animal to be delivered up was thus removed. The practice still existed for some time, however, not on the grounds of reason, but because of historical custom, and in the effort somewhat to moderate the owner's liability.

10. The general method of treatment is to make the owner entirely liable, assuming, of course, that the animal was moved by its semi-intelligence, and did not do the damage under the guidance of any person; in which case, obviously, it is to be regarded merely as the tool of the person liable. This liability may be

limited in certain cases; as, for instance, in the interests of industry and agriculture.

11. What applies to animals, applies also to slaves: also in regard to the latter the principle existed, that if a slave committed a wrong he must pay the penalty, unless, indeed, his owner made himself liable for him. Strangely enough, among some peoples, this idea aided in ameliorating slavery, by making it possible for a slave to change his master when he liked. It was only necessary for him to do another man some injury, whereupon the latter demanded that the slave be delivered over to him. Naturally, this might be arranged between the slave and the new master; and it finally led so far, that by any symbolic injury, the slave could procure another man the right to take him away from his master, and claim him for himself (*Bondo-Recht*). Thus slavery was mitigated, and it was greatly to the interest of slave-owners to treat their slaves well; so that the latter should not make make use of the above expedient. This is another instance where the unexpected use of a legal institution led to a remarkable advance in culture.

SECTION XX

III. PROPERTY AS A WHOLE

1. *General Remarks*

1. The totality of a person's proprietary powers constitute his property. In numerous cases, the totality of these relations experiences a common fate and it is therefore of interest to unify the totality.

2. This unification does not mean that the totality represents a different legal object from its constituent parts (p. 70 (4),) but it does lead to this, that:

(*a*) Certain legal acts and legal destinies include all the proprietary objects;

(*b*) Debts are encumbrances on the property, and must be carried by him who takes over the property;

(*c*) The principle of substitution holds in accordance with which if an individual proprietary object is exchanged for another, the other takes the place of the first and becomes part of the property. (p. 71 (5*c*).)

3. A closer consideration of this matter belongs to civil law, and need not concern us here. In examining the subject philosophically, it need only be said that the most important instance in which property appears as a totality is in the law of inheritance. And to this we will now turn our attention.

2. *Inheritance*

(*a*) In General.

1. Inheritance is based on the idea of the continuity of the individual property after the death of its owner, through a person who is connected with this owner in a definite way, either by reason of family or a similar relationship, or by reason of a legally effective testamentary provision that creates a new relationship.

2. The right of inheritance, therefore, does not exist in any of the following cases:

(*a*) If after the owner's death the property reverts to the community. Hence when, in Rome, property fell to the *gentiles*, or when as today, in the absence of heirs, it falls to the *fiscus*, it is improper to designate this an inheritance. It is merely called inheritance, because the technical juristic principles governing inheritance law have been extended to include such cases.

(*b*) Neither is it inheritance if the proprietary rights of the deceased cease, and another, unrelated to him,

acquires the property; for instance, by new investiture (*Neuverleihung*).

(*c*) It is not inheritance if a man is a joint owner, and on his death his share either is merged in others, or another takes his place as a joint owner, but not by virtue of the dead person's disposition of his property, but owing to the special principles governing rights held jointly.

(*d*) It is not inheritance if the property of a juristic person, after the dissolution of the juristic person, falls to an individual, or another juristic person; although this, too, is often treated technically as an inheritance.

3. As inheritance rests, above all, on family relations, the principles of family organization are mainly determinative for the inheritance, and this in two respects: first according to the kind of organization and then according to the degree of exclusiveness. If we ask who stood nearest to the deceased person, the first thing to be considered is whether the family organization conforms to matriarchy or patriarchy (p. 105); in the one case, the nephew, in the other the sons, will succeed. But, also, in another respect, the family organization must be considered. If each family is distinct in itself, and sharply separated from the other, so that, possibly, they are at odds with each other, then, as was emphasized on p. 107, the individual must belong exclusively to one family or the other, since one could not be, at the same time, a member of both the families *A* and *B*. In this case, the succession conforming to matriarchy will be exclusively matriarchal, and that conforming to patriarchy exclusively patriarchal; and in the latter case, the child will be able to inherit only from the father and his family, not from the mother and her relatives.

Not until families are less sharply divided from one another, and are merged in the unity of the State to which they leave the guiding functions of culture, and when there can no longer be any question of struggles between families, does the time come when a person can belong to several families as regards the right of inheritance. (p. 106.)

The whole development of the law of inheritance among modern peoples is filled with this idea; and Roman law, in particular, labored for five centuries before it finally forsook the agnate right of inheritance, that is to say, the right to inherit exclusively from the paternal family, and established the right to inherit from both the paternal and the maternal families, which is called the cognate right of succession. The Germanic law also developed in the same way; largely, it is true, under the influence of Roman law.

4. The position of women, as regards the law of inheritance, is also closely connected with the family system; as appears, for instance, in the treatment of daughters. Patriarchy does not indeed prevent both sons and daughters from inheriting from the father, but the daughter's right of inheritance leads to an undesirable result; for if the daughter marries, her property, according to the principles of patriarchy, is transferred to her husband, and the property of her family is thus considerably reduced. If the daughter of family *A* marries into family *B*, her possessions will fall to family *B*, and thus be lost to family *A*. This idea of itself led to the result that the daughter was deprived of her heritage and restricted to her dowry.

From this standpoint, there could, of course, be no question of a woman's children's inheriting from her, as by her marriage she herself had been deprived of her property; and, if a widow, she became dependent on annuities and usufructuary rights.

All this was changed when the principles of patriarchy became weakened and a woman retained her property in spite of her marriage. No logical reason then any longer existed for excluding daughters from the right of inheritance, although, on other grounds, many restrictions were laid upon their inheritance rights. It followed, that the children of a mother who, as a wife or widow, possessed property, would inherit from her; for it was no longer in accordance with the principles of family organization that a woman's brothers or more distant paternal relatives should inherit from her to the exclusion of her own children. This gave rise to the right of children to inherit from their mother, which can be traced in various forms in the laws of nations that were governed by patriarchy, as, for instance, the Romans and Jews.

5. With this development, a characteristic change took place in family life. Whereas, in the time of family property, the various branches of the family lived, worked, and earned together, the different brothers and their branches of the family now struck out for themselves. This brought about a significant new formation.

Formerly, if one of the brothers died before his parents and left children, these children inherited nothing; the remaining brothers inherited everything, and were, of course, obliged to care for their dead brother's children as for their own. It would have been considered monstrous for these children to have contended against their uncles and claimed anything for themselves. But, when once the fraternal branches of the family were separated, so that even during their lifetime, the brothers with their children had separate property, then the opposite course must have appeared monstrous; for it is unnatural, that if the head of the family dies, and leaves

descendants, the main line shall suddenly be erased. If the other bearers of the family name, that is to say, the brothers, are still alive, it may indeed long appear that because of their near relationship to the head of the family, they have superior rights in his property. But this idea soon conflicts with another, that the children of a dead son stand quite as near to the head of the family; in fact, that the relationship of grandchildren to their grandfather is usually an especially intimate one.

Thus originates what has been called the right of representation, which in reality is nothing but the principle of trunk distribution (*Stammteilung*), as I termed it thirty years ago. The maintenance of the opposite principle in some systems of law, among others in that of Islam, is merely a defect in development, and shows that these systems have, in this respect, remained arrested.

The same applies when there are no sons living, but only grandsons; in this case, the idea of treating all the grandsons equally, without regard to the number of family branches and the number of children in each line, is also a defect which stands in open contradiction to the usual separation of the lines; for which reason, all the nations of the European continent have accepted the division into family lines.

(*b*) Indivisible and Divisible Inheritance (*Einheits- und Mehrheitserbrecht*).

1. The struggle between individualism and the social tendencies of humanity is also seen in the law of inheritance. On the one hand, the individual demands consideration, and, if there are several persons of equal position, he demands the same measure and amount of consideration as they receive. On the other

hand, social life often demands that a deviation be made, and that one or more individuals be forced into the background.

This struggle is especially pronounced in the treatment of children. That for a long time women were less favored than men, that is, the daughters less than the sons, was due to the special law governing the sexes, which has already been explained. (p. 194.) Yet, even among persons of the same sex, although the individual urges equal treatment, the social aspects of the family and of property frequently require another course.

2. The social mission of the family often demands, in particular, that the estate remain intact, and not be divided among several children. This may be the case for various reasons; especially if a division of the estate would mean that its power would be destroyed or weakened; the portions into which it would be separated not having the same economic significance as the unified whole. Religious reasons often oppose such division, when the estate is also dedicated to the gods and to their service, and religious observances in the family are to remain uniform.

3. This disagreement may be avoided if the estate remains intact, and the children live together in unity; so that the property of the head of the family belongs to all the children and their descendants, while the fact that its management remains in the hands of one person does not prevent the various members of the family from pursuing different interests. But, from what has already been said, we have seen that it is not possible for the family to continue in this kind of life permanently: for not only do the interests of the different members clash, but also their fundamental differences of character, and this must necessarily break up the unity. (Compare p. 47 (7).)

4. If the individual's claim to a division, and the social claim to unity, of the estate, cannot be reconciled in this way, one of the two claims is forced into the background. And here, it is self-evident that the social interest must come before the individual claim; for under the stress of social decay, the individual also would be ruined; whereas if social interests are maintained, it is still always possible for the individual to make his way, and find his proper course. This has led to various solutions. The whole estate may go to only one child as, for instance, in East Asia, in China, and Japan, or at least one child may receive far the greater part of it, and at the same time be obliged, more or less, to provide for the others. A more detailed discussion of the subject lies within the province of legal history. It need only be said here, that philosophically all these institutions sustain the social endeavor to counterbalance the exaggeration of individual activity. The special question whether the oldest or the youngest child, or one chosen by the family, or by the father himself, is to be the manager of the whole, cannot be generally solved, but must depend on the conditions of life, and on national views and customs. It may be said, however, that the right of the eldest would seem to be the most natural and appropriate; for the eldest son is thus placed somewhat in the position of a parent, as regards the younger children, and this gives him a certain support. The right of the youngest son, on the contrary, can only be justified by certain peculiar family conditions; as, for instance, if the older sons have left the home, and the youngest devotes himself to the care of his parents, and hence takes over their house and property. The practice of permitting either the family or the father to make the choice will lead to favorable results only if the others have so much confi-

dence in the one entitled to choose, and if the family feeling is so strong, that all immediately submit to the choice made, and also if their faithfulness to duty, and to the welfare of the family, is unquestionable; so that it need not be feared, that those with whom the choice rests will allow themselves to be influenced by personal motives — a proceeding that would mean psychic ruin and the decline of the family. With us such a right of choice has therefore been generally excluded.

(*c*) Disposal of Property after Death.

1. The question whether it is proper to accord to the holder of property the capacity to determine the fate of the inheritance after his death has occupied the nations much. The discussion of those particular conditions that led to the introduction of the will belongs to the history of the law. There it appears, that quite different motives, which were partly religious, partly of a family nature, and partly also connected with statesmanship, led to the granting of such a right of disposition in greater or less measure.

2. The legal philosophical significance of the will lies in the increased importance of the individual, as opposed to the family, and in the insistent claims of the members of the family to the property left. The claims of the family as regards the different portions of the property are not always equally powerful; not seldom, a distinction is made between property which the owner has inherited from his family, and property which he himself has acquired. The inherited property is regarded as an indivisible portion of the family property; and this view frequently brings the efforts of the individual to naught. Of acquired property, on the other hand, the individual has the free capacity of disposition, even after death. Here, too, we see the conflict between

individualism and sociality, and the question is whether the welfare of society is to be expected from the triumph of the one or of the other element.

3. The predominance of individualism to such an extent that the holder of property has the power of disposition corresponds to human development; for it is promotive of culture, if property does not always take a certain course, but may be devised by the owner to certain purposes, and thus making it possible that great undertakings of mankind may be considerably advanced. This gains added significance from the fact that it also increases the instinct of acquisition, and causes a man to strive with all his might to obtain the means of carrying out his will, even after death. In this way, the possibility of disposing of property after death is a powerful incentive; it increases the individual's devotion to his work and to his business life, and this, of course, advances cultural life in a high degree.

4. The inheritance of property according to a fixed system gives rise to grave questions, for it is simply a chance if the property falls into the hands of those who know how to appreciate and make proper use of it; whereas, if the owner can dispose of it, he can choose the persons who may be expected to turn it to the best account. Moreover, the individual who acquires the estate, will have a strong interest in choosing a fit successor, and even though he may make mistakes, yet his choice will generally be better than that of fate, or rather, chance.

Other advantages are the following:

(*a*) That larger masses of property remain undivided, and thus can be used for the advancement of economic, scientific, or artistic purposes.

(*b*) It is possible that the estate may be taken entirely out of the hands of incapable or unworthy heirs, and be

devised to those who will obtain the greatest benefit from it; it can also be adapted to the most various purposes. In this way it is more or less possible to attain the ideal of placing the estate in the hands of those who will use it most effectively.

This is the higher meaning of the right to dispose of property by will, and this meaning must be borne in mind in the legal effectuation and construction of testamentary dispositions.

5. It must be admitted that there are also certain disadvantages connected with the right of testamentary disposition. The owner of the property will not always be guided by the proper considerations; sometimes he will be subject more or less to improper influences, and, in fact, all the dangers of individualism will here be pronounced; for even the normal man vacillates between individualistic cultural endeavors and human prejudices and passions. Yet, the greater weight certainly lies on the side of progressive and cultural endeavors; hence the right of disposition of property after death must be accepted as a cultural factor.

6. In this connection different important special questions arise which have been solved in the most various ways in the different national systems of the law; in themselves, they belong to the sphere of legal history, but they have also certain legal philosophical aspects.

(*a*) There is the question of the revocability or irrevocability of the will. There are strong grounds against irrevocability based on the contractual theory (inheritance agreement), inasmuch as the individual thus destroys his own power, and, we may say, digs his own grave. All the reasons mentioned above speak for revocability, especially the idea that the free power to dispose intensifies the instinct of acquisition. Such a restriction may paralyze the individual's industry and

instinct of acquisition, and thus considerably hinder the work of culture. Not only for this reason, but also on other grounds is revocability desirable; many a man will avoid making dispositions that bind him forever, and deprive him of the capacity to change his will. Consequently, he will continue to put off making his will, with the idea that circumstances may change, and that what is desirable today may prove to be unsuitable tomorrow. Thus, a variety of beneficial arrangements will fail to be made; they will be put off from day to day, until it is too late; while where there is a will, the idea that it may be revoked affords mental satisfaction to the testator. If, notwithstanding, the present [German] civil code, in contrast to the wisdom of the Roman law, has accorded wide recognition to the contractual limitation of the will, it is partly because certain important vital connections are involved; above all, the relations between husbands and wives, which to a certain extent do not lie within the circle of general consideration, and thus require special attention. The whole institution of marriage, indeed, conflicts with the legal principle that permits the individual to bind himself only temporarily: it appears to a certain extent as an exception which is only justifiable on ethical and social grounds. Inheritance contracts between husband and wife, especially in connection with the marriage contract, may here find their justification. Under other pressing circumstances, too, it may be justifiable to go beyond the fundamental rules of personal liberty; as, for instance, if it is only possible for some one to obtain provision for his old age by promising the person who maintains him at that time a definite share of his property. But, on the whole, the inheritance contract is too much at variance with the principle of individual liberty to be regarded as a healthy institution, and

wherever blind dependence on earlier social conditions has led to its adoption, it must be looked upon as a legislative mistake.

(*b*) Great difficulties have been raised by the question, whether individualism in the disposition of property shall be given free rein, and everyone shall be allowed to dispose of his property unconditionally, or whether certain restrictions must be imposed. It is so well known that, in this respect, different systems of law have taken different courses that the point need not be further discussed here. But it must be said that, in this regard the psychic conditions of a nation, and especially the influence of social motives, come under consideration. The praise and blame of society (*nota censoria*) are factors that cannot be ignored: in this regard, society plays perhaps the part of a censor that is still highly respected, even though the mind of the people does not make itself fully felt until after the death of the testator. In addition, national custom, family feeling, the way in which property is administered, will all exercise a strong influence; and thus it may happen, that the individual is given the full right of disposition, since other circumstances guarantee that the principal outgrowths of exaggerated individualism will be avoided.

Other nations do not trust in this, and therefore provide that at least a portion of the property must remain for the legal heirs or certain near heirs. In this connection, we speak of a free portion (*Freiteil*) in contrast to the privileged property, or of a compulsory portion (*Pflichtteil*); in as far, as certain persons have the capacity to require that they shall not be deprived of the portion of the inheritance that would fall to them by legal succession. There is wide variation in legislation as regards this point; but in most European countries, the right to the compulsory portion has been estab-

lished. Some other systems of law, for instance that of Islam, allow the disposition of only a portion of the property. One of the disadvantages of the compulsory portion is, indeed, that it prevents the carrying out of highly important dispositions of property, and especially does it make it impossible for the head of the family to keep the estate together by leaving it to one child, so that by voluntary disposition conditions might arise similar to those that were described in connection with the inheritance right of the eldest or youngest son.

(*c*) A third question concerns the creation of future estates, in the testament providing for a succession of heirs (*sukzessive Testament*), in which it is provided that one and the same estate shall be subject to different successions in turn; so that after one succession a second and a third follow: limited inheritance (*Vorerbschaft*), reversionary inheritance (*Nacherbschaft*). This relation operates as a restriction on the limited heir (*Vorerbe*); for as the transition to the reversionary heir takes place by virtue of a conditionsubsequent (*auflösende Bedingung*) the disposing capacity of the limited heir is naturally much limited by reason of the condition subsequent. Further restrictions, too, are often necessary in order to secure the property to the reversionary heir. This gives rise to a legal situation, in which, on the one hand, the limited heir is restricted, and, on the other, the reversionary heir is secured; hence, even though the reversionary heir is the one who, in all probability, would succeed the limited heir in any event, yet the situation is a different one: for the fact that the property is entailed (*Verklammert*), provides for the reversionary heir, whereas otherwise, as the heir of the limited heir, he might suffer by the property being squandered in the hands of the limited heir. The question is whether the testator shall be allowed to bind the

estate that will descend to his heir in such a way that the heir cannot dispose of it, and that it passes from him on to a second person (the reversionary heir).

Here, too, we find the same struggle between individualism and the social mission of the law. The entail and the restriction that it imposes on the first heir often proves a great obstacle to the latter in the development of his personality. On the other hand, it may be advantageous if the property is all kept together, and descends in its undiminished totality to a later generation. This is especially the case because a provident generation is often followed by an improvident one; in this respect, this institution is often beneficial, as it saves the estate for the third generation. To what an extent this whole institution is a social need is shown by the fact that Roman law, which at first refused to recognize it, later accepted it in a roundabout way; that is, by way of the universal *fideicommissum*, and that the French code which at first fought tooth and nail against this institution has yet, to a certain extent, acknowledged the justification of its existence. On the other side, such dispositions, tying up property as they do, may be not only injurious to the individual, but a menace to culture as a whole.

We have to do here, as always, with the choice between two systems, of which each has its advantages and disadvantages, and in this case, too, special cultural conditions will have to determine in which system the advantages or disadvantages predominate. We assume, today, that a certain tying up of property cannot well be avoided, but that it must be within certain limitations, so that it does not bind whole generations and centuries; for otherwise this, too, would be a case in which individualism would dig its own grave. The far-reaching hand of the testator who would enforce his will in

distant future generations destroys the liberty of other individuals, and presumes to make rules for distant times. Of course, later periods will not always acquiesce in this, and thus here, too, the necessary limitation arises out of the struggle between the different systems. It is usual, therefore, to take a more or less middle course, and to allow the control of estates for a certain period of time, after which the property becomes free.

(*d*) Of most particular importance is the possibility of permanently establishing the estate in such a way that it is devoted to a certain definite purpose, and even in the future may have no other uses but to serve this purpose. Such dispositions are necessary, since many cultural aims can only be accomplished in this way; and especially is it of high value that certain undertakings should receive steady and unceasing support, and should not be cultivated only for a time and then thrown aside. The audacious daring of the human intellect requires stability, not only on the part of the individual but of the whole. Only thus can the highest aim be attained, whether it be of knowledge, in esthetic or religious education, or only in beneficence and economy.

Thence follows, as a matter of course, the justification of the Foundation as an institution, and the demand that the law's attitude toward it shall not be repellent but encouraging. On the other hand, the dangers must not be underestimated; for certain aims may, possibly, be only of temporary significance, and certain activities that are beneficial at the time may run counter to the interests of the future; hence, it was found necessary to impose greater or lesser restrictions. Yet, the idea of the Foundation is a fruitful one, and important both in the present and for the future. It has been much developed in the Orient and in the Occident, and belongs to the bright pages of the Greek system of law.

B. THE LAW OF THE BODY POLITIC

CHAPTER VIII

STATE LAW

FIRST MAIN DIVISION
THE STATE

SECTION XXI

I. NATURE AND IMPORTANCE

1. *The State as a Personality*

1. The State is a community organized into a personality which, by virtue of its own law, takes upon itself the task of promoting culture and opposing non-culture; and it aims at performing this task not only in certain respects, but in all the directions of human endeavor and development. Even though other institutions promotive of culture may exist, as well as the State, yet they should be active within the State and by virtue of State organization, penetrating this organization in such a way that they too become parts of State life.

2. The State is, therefore, a State of culture, and as such, it is not only its own justification, but its own sanctification. To doubt the State is to doubt culture; for a development of culture without a systematized energetic activity of the whole, and without the necessary social means of protection is an impossibility.

3. Hegel expresses this by declaring the State to be the realization of the rational idea, and in striking words Nietzsche, too, has explained that it is an indignity even to call the State to account and ask for its credentials.[1]

4. The "culture" State stands in contrast to the mere "legal" State that was much taught at the beginning of the nineteenth century; as if the State's sole mission were to realize and establish the law and nothing more. This view is entirely wrongheaded, and assigns a poor place to the State and its aims. The fact that formerly in national assemblies, justice was pronounced, laws were made, and ordinances were issued, does, indeed, imply a certain intimate relation to the administration of justice; but, only, because at that time the different activities of the State were not separated, and all its functions were treated equally in the national assembly. Hence, no support can be found in this for the idea of the "legal" State.

The "legal" State is of importance only inasmuch as the State should be *not alone a "culture" but also a "legal" State.* Culture having created not only the law, but also rights, the State should not overthrow these rights and trample them underfoot; but, while upholding them as far as possible, should proceed with the development of culture. It must be admitted that this will sometimes lead to conflicts; for the demands of culture often require the downfall of existing rights. The solution of this difficulty lies in the institution of expropriation; that is, in the possibility of destroying a right by giving suitable and adequate compensation. Expropriation is the real nerve of the "legal" State in its connection with the cultural State. It expresses the progressive inclination of the "culture" State, in contrast to the conservative stability of the "legal" State.

[1] Compare "Archiv f. Rechtsphilosophie," I, p. 359.

5. As has been said, the justification of the State lies in this, that it is a practical union of men, for the purpose of opposing whatever is contrary to culture, advancing culture in all its forms, and furthering the education and development of mankind.

Man cannot act effectively except in such collective unities. It might, indeed, be put forward as a desideratum that the individual State should only be a subordinate member of one great whole; but the time is far from ripe for such vast ideas of universality. The inhabitants of the individual countries are still too different, their languages and methods of thought too peculiar to themselves, to allow of any such union. We are only attaining to a kind of world-State gradually, by the drawing closer together of the individual States, and the embodiment of the community of cultural endeavors in common legal institutions. But, as long as this has not taken place, the State remains the representative of culture, to whose will the individual must necessarily bow, and which is allowed to oppose resisting elements, and to hold antagonistic forces in check. It is its duty, moreover, to force home the knowledge that ideals rule in culture which no nation can permit to be crippled.

2. *The State and the Individual*

1. The State cannot exist without making great demands of individuals. It even requires of them the service of body and life, in as far as the preservation of the whole, the independence, or the honor, and the ideal possessions of the nation are concerned. But such sacrifice is the less oppressive because without it, not only would the State perish, but likewise the individual would be fettered and bound: the enemy that conquers the country would also tyrannize over its people.

Hence, the individual's devotion is not disinterested sacrifice, but rests on the co-operative position of the individual in the State.

2. Other performances that are required are the contribution of property, also necessitated by the individual's co-operative position. But this matter, also, must not be left to chance: the burden must be suitably distributed. The better regulation of this distribution has only been accomplished in modern times, since the science of finance has established the standards, according to which the assessment should be made. It must be governed, in particular, by the ability to bear it, that is, by the possibility of the individual's making such a sacrifice of property, according to what he possesses: but it must also take into account what share the individual has in the achievements of the State. The presentation of this sphere of knowledge leads us into the realm of legislative policy, and modern social science, and may therefore be omitted here.

3. *The State and its Organs*

1. The State needs a staff of organs that are active for it in the most various directions; for its objects are so many-sided, that they can only be attained if a large number of experts devote their whole power to these purposes. Nevertheless, the State must not be merely a bureaucratic State. It is a vital matter that also non-technicians, so-called laymen, should share in its government. This procures not only obvious and direct advantages, but also great indirect ones. It is true that the layman, as regards technical education, trained ability, and experience, is decidedly inferior to the official, but his activity is of great advantage in that it prevents State institutions from ossifying, and the functions of the State from becoming one-sided.

It invigorates the government with new life, new views, new experiences, in connection with the rich activities of life. The government should not be lifted entirely out of the whole national life, but should stand in the centre of it. All the insight of the citizens, as a whole, should be made of service to the State.

2. In addition, the presence of the layman is of great indirect importance; for it preserves the unity of the State, it prevents the growth of impassable chasms between the governing and the governed, between those who have a voice in the conduct of the State and the rest of the people. A strong dividing wall between the two is a great evil: it fosters division among the people, and leads, especially, to a lack of confidence in the government and its measures, and to the fear of being taken advantage of by the ruling organs. This disappears when men of the people enter into the government, not permanently, but temporarily, and with constant changes; so that a steady stream flows from the government to the people, and from the people to the government. This is for the most part also the significance of the national assembly and of the parliament.

SECTION XXII

II. EVOLUTION OF THE STATE

1. The State was originally a totem State, and consisted of the union of various groups bound together by the unity of their animal god, which sacred bond, however, gradually went to pieces, leaving the clan or family tie. This is based, as was the sacred bond, mainly on the unity of blood, but with the rejection of the

animal god which had fused the families together in one uniform spirit. Worship of ancestors then took the place of the totem belief, and it is the spirits of the dead that hold the family together, give stability to the clan, and in the worship of which the whole finds its consecration. All our cultural States were formerly clan-States; and in the unity of blood, the unity of descent, the unity of their view of life, lay their strength. Such a clan-State does not require clearly defined territory. It remains the same even when the clans wander. The German tribes remained as they were, even when they wandered from the Balkans over the endless Russian plains to the Elbe, from there to the Rhine, to the Rhone, and from there to Italy; and it is just the same with the numerous Bantu tribes and Hamitic peoples who wander, constantly changing their place of abode. There is an extraordinary communal nerve in this clan connection; and it is comprehensible that all phenomena of life under these conditions are social in character; and that all thought and action unite in the idea that each individual is a member of the tribe whose famous ancestors are worshipped as divine, and that he performs his great deeds in the sight of his forefathers.

2. A tremendous change takes place when the tribal tie gives way to the territorial tie; and this appears in two new legal institutions which embrace all life and activity. The first is that persons are received into the nation who do not belong to the tribe; so that the number of clans and families can constantly increase; and that in this way persons enter who do not worship the common spirits of the tribe, and whose ancestors are in no way connected with the ancestors that compose the tribal cult. This is, of course, a sign of a certain decline of ancestor worship, and the clans certainly

must have felt this for a long time, and have persecuted the intruders with all their might; nevertheless, this event, like every other development that lies in the hidden folds of the world's history, cannot be prevented. What universal history desires may for a time be delayed by the mind of man, but cannot be permanently suppressed.

3. A second factor comes under consideration. Whereas, formerly, the tribe lived in and to itself, including only itself and its slaves in the sphere of its power, and leaving its neighbors alone even when they lived on the same land, the necessity now arose of exercising complete dominion over a certain territory in which the members of the State have the upper hand. Disputes with those living outside the boundaries, however, became so numerous and violent that there was no alternative but to extend the authority to them also; at least to the extent of repressing certain activities injurious to the State, establishing certain police regulations, and defending the State against the encroachment of this alien population. Chieftainry especially is often very prominent in this connection. Herewith the idea of the territorial State is firmly established; not only do the tribes admit others to their ranks, but even persons who are outside the circle of those belonging to the State must submit to the commands of the ruling people. This was the system that was carried out in all our culture States after the destruction of the old Germanic principle of personality. Only in the Orient does the old system still exist; but there is a privilege that the Occidentals with their high culture have obstinately wrested from the Orient: the Occidentals refuse to submit to the law and jurisdiction of Turkey and Persia, and wish to live under their own laws and own authority, even on the territory of these Oriental States.

4. A further division into classes of the population is sometimes accomplished by way of conquest. It often happens that the conquerors force back the original people entirely, or so decimate them that they no longer play any part in the life of the State. But not infrequently the old population is preserved as a second layer or class, if for no other reason than because the conquerors are not able to perform all the useful labor that is necessary to the maintenance of their life, and hence make use of the conquered inhabitants as a servant class. The latter may be oppressed and held in slavery or helotry, or they may be granted a freer position, partly in recognition of their developed civilization, partly in consideration of the fact that free labor appears to be more advantageous, or that the original people are so far masters of the situation that the conquerors must live on terms of agreement with them, and cannot utterly subjugate them.

In this way, a mixed population easily arises in which the conquerors assume the rôle of masters, and form a sort of nobility in contrast to the lower inhabitants. (Compare p. 96.)

Sometimes, another layer or class of population is formed by the addition of some other people that is dragged from its own place of abode and settled in the country.

All these circumstances oblige the tribal State to adapt itself to the altered conditions, and to blend the added elements more or less with the life of the State.

5. In the transition from the tribal State to the territorial State, much of the unity of the people is transferred to the State territory, and the State system of rulers now embraces the land without reference to the inhabitants.

This might easily lead to the conclusion that a man's residence on State territory established the fact of his

belonging to the State. This of itself would mean a tremendous transformation: there could no longer be any citizenship independent of the place of residence. But such a development could only thrive if the aspirations and endeavors of the different States were so uniform that the change of allegiance from one to another could follow without a displacement of interests. Hence, it was possible to carry out this system in a confederacy of States; so that its citizens could belong to one or another of the individual States according to their residence or place of abode. But as long as the interests of States are so various, indeed, even antagonistic, and each State develops independently to a certain extent, this system would be detrimental. Neither would it be ethically desirable; for in such disputes and struggles, it is necessary for the individual to adopt a certain definite course, and to make the collective interests of one or another of the communities his own. Hence, it is still necessary to maintain citizenship apart from the place of residence, and to give it a greater significance in the position of the individual in legal life; also, in particular, to combine political activity with citizenship.

6. In spite of the territorial principle, therefore, the difference between citizens and aliens still exists; and in such a way that citizens still remain citizens, even if they settle in a foreign country; and that aliens living in the State must indeed submit to its laws, but can have no part in the government, and that their family conditions are regulated according to their hereditary rights.

Thus, a certain disagreement arises which, however, is allowed to remain as long as it is not dangerous to the State. But if it becomes undesirable, it then is necessary to drive the aliens out.

A complete solution of the disagreement has never been achieved, and will not be here attempted. A

compromise has been adopted by some States, however, based on the principle that in certain cases the alien becomes a citizen without further steps. Thus, the rule has been established that an individual born in the country is a citizen, or, in some States, only if also his parents were born there. And instances are not few where residence for some time suffices to give aliens the right to acquire citizenship. In this way the number of foreigners living in the country can be reduced, and the discord spoken of above can be partly avoided.[2]

SECTION XXIII

III. THE STATE IDEA

1. *State Theorists*

1. The whole series of imaginative representations of the State based on a lofty conception of the destiny of man, and of the significance of the State in the development of humanity, began with Plato. These Utopian compositions did indeed emanate from an ideal and visionary mode of thought, but they are still of great importance as marks at which a perfection of the State can aim; for it is always beneficial to humanity if the ideal is held up before it.

2. Plato's ideal State was, it is true, arbitrary in a high degree. He disregarded not only historical facts, but also the psychic conditions of human development, and thus gave occasion for aspirations which with despotic power attempted to bring about a definite new order of conditions; but, not being in harmony

[2] In this connection, compare my essay on international law in the "Z. f. Völkerrecht," iii, p. 113, f.

with the psychic conditions of the peoples, necessarily failed. The attitude of humanity may, indeed, be influenced from without, but the actual motive power must proceed from the soul of the nation; and the essence of royalty does not lie in forcing everything upon the people, but in the ability to direct, more or less toward its own aims, the impulses and instincts that are inherent in the people.

Much may be traced to Plato's mood and to his depression of spirit, in regard to the conditions of his time.[3] Hence, in his Utopia we find both remarkable progress and extraordinary regression. He describes the sexual tie as group marriage, much the same as the old group arrangement; so that it is not known of any child who his father is, scarcely who is his mother; this has a connection with the modern idea of selection and State supervision of the sexual relation.

Community of property also is a perfectly antiquated phenomenon which the Greeks had long since left behind them; while, on the other side, no one before Adam Smith, at least, has so clearly explained the advantages of the division of labor as Plato. Exceedingly progressive are his ideas on the development of women, to whom he would give a position in the life of the State similar to that occupied by men; accompanied by complete dissolution of the family, however; for not only are the children to be trained and educated by the State, but even the suckling of infants is to be a common duty.

We also see in Plato (as in Aristotle)[4] the historical limitations of the Athenian philosopher; work, unless it be the work of governing, or artistic and philosophic production, is to him low and slave-like, and is there-

[3] Compare *Zalesky* in "Arch. f. Rechtsph.," I, p. 395, 545; II, p. 89.

[4] See above, p. 95 (7), 177.

fore left to a lower class of the people, who are treated more and more like bondmen. This is the grossest error into which a State can fall, for the nobility of labor will elevate the forces of the people; and by the increase of technical economic production alone can we attain the control of the world. To this may be added that this production must stand in the closest relation to the advance of our scientific knowledge of nature, which can only be the case if technic, too, is ennobled, and fully recognized by science as its equal.

3. There is something quite unhealthy about the whole, nor is it clearly thought out. What must repel us most, however, is that a man with such an artistic mind, whose art in dialogue has never been excelled, whose language is the delight of all scholarly men, takes a position entirely antagonistic to art, and rejects its creations as deceptions and frauds, failing to perceive that it is just art that can best present his ideals and keep before our eyes, by the constant creation of worlds, the relativeness of the sensible world. Aristophanes has therefore also derided Plato's "Politics"; and in the work of his old age, in his "Laws," Plato has materially changed the original ideal, though scarcely in an attractive manner — the State that he describes in this later work is an agrarian police-State with a strictly regulated family régime.

4. The whole sophistry and world-remoteness of Plato's Utopia has been ably exposed by Aristotle in his inestimable book on Politics. In contrast to this artificial State compulsion, Aristotle goes back to the nature of man and utters the famous words that man is by nature a social being, and that the political community is his proper natural state. Better than anyone before or after him, he knew how to show that man, more than any other creature, was created for companionship,

as his language alone proves. He even says strikingly that the State naturally existed before the family and the individual, a remark that has been much misunderstood, but which is fully corroborated by our present knowledge of primitive conditions. This knowledge makes it certain that, originally, the individual did not come to the fore, but existed and acted only as a member and organ of the whole. And he also asserts, anticipating Hobbes, that if man is not properly governed, if he lacks laws and rights, he might become the worst of all creatures. But control of justice must emanate from the State, that is, all virtue begins with the community. From this grand structure he then undertakes to construct the State, after which he ably rejects the Utopias of communism and ultra-collectivism. He points out that the resources of the earth do not find their proper usefulness except by the participation of the interests of individuals, and emphasizes that two things, in particular, are the objects of man's care and love: what is his own, and what he longs for. What makes ownership a boon to the nations is that each individual may devote himself to own property; great virtues, like generosity, cannot make their appearance until the individual has possessions that he may call his own. With the sameweapons, he attacks the community of wives which he says entirely destroys family life, and distorts the relation between children and parents; for the same reason, he criticises sharply the lax discipline of the women in Sparta, and lays stress upon the fact that essential cultural conditions of the State are thereby disrupted. He also turns, with remarkable skill, against the inorganic unity that would arise if all such distinctions as family, village community, etc., were removed, and individuals were simply merged in one great ungraduated, disconnected mass. The unity must be organic,

just as in music the symphony must not become simply a monotone, nor rhythm merely a single measure.

5. Aristotle's idea of the State could not reappear until in the Middle Ages, when Aristotle himself became known. He was first revealed again to the Occident by the Arabian philosophers, especially Averroës, Alfarabi, and Avicenna, who, however, represented at the same time the idea of Persian sufism, and thus became the founders of Germanic pantheism which in its day was such a powerful leaven in the whole development of the Middle Ages.

But Aristotle's theory of the State necessarily conflicted with the idea of imperialism, for Grecian life had never had to do with a great, broadly outlined State, but only with small republics. But world imperialism became the ruling ideal in connection with the Roman Empire, and the policy of Charlemagne who, by defending the papal throne against the Longobards, gained for himself the imperial crown, and brought about the transfer of the imperial power from Rome to Germany. A foundation was now wanting. The theory of the Christian imperial power, the belief that the emperor was the successor of the Roman emperor, dominated the minds of men for centuries; and the ablest intellects endeavored to explain the nature of the empire and its historical origin. It was assumed that the choice of the emperor had rested with the city of Rome, and that Rome had transferred its prerogative to the German elective body.[5]

The German emperor was considered to be the emperor of a world, not the king of a country; and the underlying idea was the union of the whole Christian world — an idea that necessarily took deeper root because the Occident, owing to the attacks of the Saracens, was

[5] See my treatise, "Dante als Prophet," p. 56 f.

obliged to combine in its own defense, and, in the Crusades actually carried out the unity of Christian life.

(a) *Church and State*

1. In the relation between the spiritual and the temporal power, there are three systems, all of which are represented in the nations. One is Cæsarean papistry in which the spiritual and the temporal power are invested in one person, as among the Peruvian Incas, and in the Caliphate; or the relation between the two powers is such that a certain agreement and harmony are assured; as, for instance, among the Aztecs, where a member of the royal family was the chief priest, a system not indeed equal to the first, but in some respects directed toward the same ends. The third system is the opposition of the two powers which may lead to tremendous struggles and conflicts, prolonged for centuries; but which, on the other hand, has the double advantage, that in this way the intelligence of the people is increased to the utmost, because each of these powers seeks to attract to itself the leading spirits of the nation; in addition, this conflict will be a protection and safeguard for the people, each power affording the nation protection from the tyranny and arbitrariness of the other. In this way, the conflicts of the Middle Ages, beginning with the disputes about investiture, to the bull "*unam sanctam*," and the decline of the Imperial idea, should be understood and appreciated. It is entirely unhistorical to place one side or the other in the wrong; both together were effective in attaining the mediæval progress of culture.

2. When St. Augustine advanced the idea of the kingdom of God, and, in contrast to it, the sinful kingdom of man, people necessarily became familiar with the idea of formulating the relation of the universal State

to God and divine government. The first man who constructed a comprehensive State system on this basis was an Englishman, John of Salisbury, who lived in the twelfth century, at the time of the struggles between Henry II and Becket, which thoroughly stirred up the question of the relation between the State and the Church. This was a few decades after the investiture dispute had convulsed the world, and aroused thinking minds. John of Salisbury distinguished between divine and earthly Natural Law. He stated that the divine law applied also to rulers. Whoever exceeded it was a tyrant and subject to the law of resistance, which, in extreme cases, where the tyrant was incorrigible, might even bring about his murder. For the rest, even he advances the two sword theory, and infers from it that royalty is granted by the Church which can also recall it. He is not a strict curialist, but is moderate in his presentation as in his life; nevertheless, he may be reckoned among the founders of curialism.[6]

3. Thus the spiritual and the temporal power, the divine State and the imperial State are placed opposite each other, and conflicts were unavoidable.

Besides the two sword theory, there were also other forms of thought that had their part in these conflicts. The relation between the Church and the State was considered to be similar to that between the sun and the moon; from which it followed that the State shone only with a borrowed light; and another important argument was the so-called Constantinian "donation" which consisted of a number of privileges which the emperor Constantine had bestowed on Pope Sylvester. This grant was a clear fraud, it is true, but it was not known to be so until much later; for centuries it was one of the cornerstones of curialism. Yet, even at that time, it was

[6] Compare *Schubert*, "Staatslehre Johannes v. Salisburys."

objected that such an act could not give away permanently essential parts of State power. These and others were the arguments of the curialists and Ghibellines, especially of Dante in his Monarchia; while Marsilius of Padua went even farther, and advocated the complete subordination of the Church to the State, on the ground of the sovereignty of the people.[7]

4. The idea of an emperor of the world was still at its height in the thirteenth century. It was attacked, however, not only by the curialists, but by the scholars of France and England, who naturally were not pleased with the idea that their power should be dependent on the Roman Emperor. Thus in John of Paris and in Dubois we find a reaction from the whole imperial idea; and Occam shows clearly that the day of world-imperialism was over. In addition, the discovery of Aristotle's doctrine, and of Averroism, with its theory of the collective soul of the people, was at variance with the imperial idea. From Aristotle's doctrine, the theory of the sovereignty of the people, already advanced by Marsilius, was developed. Althusius in particular presented it in a very pronounced form, while Bodinus developed the doctrine of the "majestas" of princes.[8]

(b) *Contract Theory of the State*

1. With Hugo Grotius the contract theory of the State, which had already been much discussed, became the general theory of the educated world.[9] It did not indeed remain unassailed, and opponents of the great Dutchman were not lacking, but in the end it triumphed.

[7] Compare "Dante als Prophet," p. 61, ff.

[8] Compare "Einführung in die Rechtswissenschaft," (3 ed.), p. 128.

[9] The Spanish exponents of natural law preceded him, of whom I shall shortly write in the "Arch. f. Rechtsphilos." *Hugo Grotius* studied these Spaniards industriously, as I have shown in an already published report ("Z. f. Handels- R." vol. 59, p. 377).

By *Staatsvertrag* it was meant that originally men wandered about in the world as individuals, but finding that such a planless existence did not suit them they combined, and agreed to renounce certain rights with the idea of furthering their united interests. There was some truth in this theory—not that it rested on an historical basis, for the historical knowledge of that period was slight—but the consciousness of the benefits to be derived from social co-operation, and of the innate feeling that the individual lost rather than gained by isolation, must have impressed itself on the age with peculiar power. No doubt could be entertained that if mankind had once been scattered, yet the impulse to unite had necessarily seized upon men.

2. Thus an original contract appeared to be such a self-evident category in the law of nature that no doubt was felt that it involved a necessary legal premise. The question whether such an agreement once made would bind humanity forever did not give rise to such grave doubts in the minds of the scholars of that time as it would at the present day.

3. The assumption, that formerly men had wandered about as isolated individuals, was indeed entirely mistaken; on the one hand, it disagrees altogether with history; and, on the other, it is completely at variance with human nature, which must have led men together from the earliest times, and not only from the period when the world was already full of worldly wise individuals.

4. The content of this State contract (*Staatsvertrag*) was most variously characterized. Quite rightly it has been already emphasized that it represents merely a framework that can be filled in with everything possible, for which reason, nothing can be done with the idea. Everyone can assume something else that has been made the subject of the agreement at the time, whether it

be practical or unpractical. In this connection, the theories of Hobbes, Spinoza, and J. J. Rousseau in particular, come under consideration.

5. One of the most interesting constructions is that of Hobbes, who based the most extreme despotism upon it, and in particular defended the rule of the Stuarts against the parliament and the revolution. He assumed that, at the time, the people had laid everything at the feet of their rulers; for that was the only way in which the brute in man could be subdued and rational principles attained. In contrast to John of Salisbury, among others, he declares that the people are not justified in proceeding even against tyrants, since the evils brought about by such revolutionary desires would be worse than the worst tyrant. Thus the State is the Leviathan that devours everything.

6. The method of Spinoza's pantheism is antagonistic to evolution, and could not, therefore, offer any basis for an evolutionary philosophy of law. Hence, it is comprehensible that Spinoza in his "Tractatus Theologico-Politicus" accepts the theory of the State contract. He elaborates it in a manner that is suggestive of Rousseau's later development, but his treatment bears traces of Hobbes's method of thought. (Compare "Tract. Theo.-Pol." xvi, 12 ff.) Thus he teaches unconditional submission to the command of the State: the command of God could only be appealed to in opposing it, if there were an undoubted revelation to support the appeal; otherwise the decision must rest with the supreme head of the State and with him only; for if everyone were entitled, on the ground of divine commandment, to appeal against the law of the State it would lead to the greatest evils (xvi, 61 ff.). This is quite similar to Hobbes's doctrine, and Spinoza thus arrives at a Cæsarean papistry of the worst kind (21,

22 ff.), in which, however, the chapter on liberty of thought and religion, stands out brilliantly with the splendid words:

"*Non finis reipublicæ est homines ex rationalibus bestias et automata facere, sed contra ut eorum mens et corpus tuto suis functionibus fungatur et ipsi libera ratione utantur.*"

Such an individualistic treatment is not indeed in accordance with pantheism, and even if in his philosophy Spinoza could not find the evolutionary historical nerve, yet, the thought of the solitariness of the Divine Being must have affected him, to the extent of causing the idea of the organic growth of the State from within to dawn upon him; and he repeats, though timidly, the principle of man's being an "*animale sociale.*" The change followed in his "Tractatus Politicus," ii, 15 ff. There the State contract disappears, and at the same time he swings completely round from voluntarism to rationalism. The State, too, is subject to laws; it too may sin by establishing institutions that bring about its ruin, and are *contra rationis dictamen.* The State must observe the bounds of reason, and thus preserve its majesty; for it cannot, at the same time, be and not be. ("Tract. Polit." iv, 4.) Of course, here, too, we find Spinoza's characteristic emphasis of religious liberty based on the original ground:

"*Omnia, ad quæ agenda nemo præmiis aut minis induci potest, ad jura civitatis non pertinent.*"—Tract. Polit. iii, 8.

7. Jean Jacques Rousseau, on the contrary, assumed that the people only delivered themselves into the hands of the ruling power to a very limited extent. They remained in the background, and were entitled to interfere if their ruler did not govern according to their ideas; and he believed that in all difficult situations

the government of the people should be heard. This power of the people, he maintained, was the first and the last resort, and had unbounded scope. Thus, Rousseau's *contrat social* became the war cry of the Revolution. It introduced the revolutionary Assembly whose history, a succession of waves of disorder, was nothing but the logical presentation of Rousseau's doctrine, which, theoretical as it was, did not reckon with the tremendously destructive forces of the human soul.

2. *Statesmen*

1. In contrast to the theorists of State law are the statesmen who were not concerned with putting forward reasons for the justification of the State but with finding its best form. The profoundest statesmen of this sort were, on the one side, Niccolo Machiavelli, at the end of the fifteenth century, and, on the other, Locke and Montesquieu in the eighteenth.

2. Machiavelli's "Principe" is a "Principe" of a period when the political virtues were lacking; hence, when it was necessary to attain the power without which the future of the State was hopeless, by reckless unscrupulousness. The "Principe" ceases to be repellent if it is regarded as a cultural, historical study, arising from the rich experiences of that time, and the fine and penetrating intellect of the great historical scholar. The dubious point lies in this, that the "Principe" seems to have won the heart of its able writer, and was held up as a shining example. This may rest on the moral obtuseness that characterized the time of Alexander VI. But it may, also, be due to evolutionary historical philosophy which holds the idea, that where the history of culture requires it, morality must become a secondary consideration. Machiavelli may, however, and this is what Spinoza and others assumed,

have desired to hold up the frightful image of a "Principe" to the view of the Florentines as if he had said: "See, this is what it will come to, if you insist on having a prince. He will be a rod to you; he will chastise you with lashings and scorpions, for otherwise he could not be sure of his life."

With a man of such fine perceptions as Machiavelli, however, it is impossible to say that he was led only by one of these motives; probably he had several. His "Discorsi" show that he did not advocate a permanent dictatorship,[10] but regarded it only as a step towards the attainment of a real supremacy of the people. In any case, the "Principe" is a cultural portrait of the Renascence; like no other, a sombre-hued picture of a certain definite period; for his assertions do not fit any other epoch. The political parties of the present day are neither so enduring that it is necessary to get rid of the resisting families in order to obtain the reins of government; nor could such a system of hypocrisy be carried out with the success that Machiavelli describes, in an age like ours with the publicity and constant criticism to which the mental lives of those who make history are subject in the press. When he says: "Few know what you are, everyone knows what you appear to be," we must retort, that today, indeed, it may be possible for the semblance to which the reality gives the lie to endure for a time, but certainly not for long. Thus, we have passed beyond the Renascence period.

3. Locke's doctrine, in contrast to Machiavelli's, did not emanate from constructive reflections, but was, rather, purely the result of English observation; the parliament having been in existence for centuries, and parliamentary rights having been considerably increased

[10] Compare *Alfred Schmidt*, "Niccolo Machiavelli" (1907), and my review in the "Zeitschrift f. Socialwissenschaft" XI, p. 654.

since the Bill of Rights. The important thing was to formulate a system, according to which legislation should not be left entirely to the individual sovereign, but would require the consent of parliament, for so it was in England. This he sought to present through the following luminous idea: the administration of the law must be just but in order to attain this it must not proceed from the same organ as legislation; for if that were the case, this organ, by means of a special law, could displace the general law and disregard it in the administration of justice; thus there would, indeed, be no stability in the laws. Hence the separation of the legislative and administrative power was necessary.

4. This idea was much more impressively presented by Montesquieu in his celebrated work, "Esprit des Lois." There the three powers were sharply divided; the judicial power especially was established as a third, with the peculiarity that the judges should be independent, and should not act, as formerly, merely as the council of the king.

This doctrine of the division of the powers exercised a tremendous influence on the future, and contributed not only to clarify the activity of the State, but also, through the idea of the sacredness and independence of the judicial office, to further security and confidence in the administration of justice. In addition, this theory was a support for constitutional government, and a letter of defiance to the absolute monarchy.

5. Next to the doctrine of the three powers came the doctrine of the rights of men. It contended that men were, indeed, subject to the power of legislation, and absolutely at the mercy of its might; but that, on the other hand, the individual as a legal subject has certain inalienable rights as regards the administration of justice; and, further, that the obligation rests upon

legislation to protect the existing rights of the individual, as far as possible. This doctrine originated with the dissenters who emigrated to America, and was then accepted during the French Revolution with the greatest fervency.[11]

SECTION XXIV

IV. THE ORGANIZATION OF THE STATE

1. *General Remarks*

1. There can be no universal standards for the organization of the State. People are in error when they assume that one kind of State constitution is to be regarded as the highest, as the final aim of development, toward which eventually all countries must strive. This is a relapse into the ideas of Natural Law, even though it be in Hegel's refined manner. In reality States that are quite differently organized may attain the highest point to which their powers can carry them; and we need only emphasize that one people will find the right expression of its national being in one form, another in a different one.

2. To develop the difference of these State constitutions is a matter for general State law. It is only necessary to remark that the idea of organization may vary greatly. It may be that certain persons are destined, once for all, to guide the State, a conception that formerly rested on a religious mystical view, as if the godhead and the power of the world pressed the staff of government into the hand of one person or one family; or it may be the general national idea, according to which the people

[11] "Einführung" (3 ed.), p. 126. The idea of the rights of men is most beautifully expressed in the American Declaration of Independence.

are destined to rule, and must themselves form their own organization; the one its the monarchical the other the republican system.

3. Many systems long outlive the original ideas from which they sprang, and thus it is with the monarchical system. We do not believe that the powers that rule the world are any more concerned with an individual family or person who is to rule than with the destinies of men generally; we believe that they are connected with individual persons, only in as far as the whole development of humanity emanates from a higher principle; we do not believe in special intervention in individual cases. Nevertheless, the monarchical idea will continue to stand; it is justified by a variety of circumstances which are discussed below. Hence, even if another view has been accepted, it is right that a legal institution which belonged to a former conception of life, and that has proved to be valuable, should be retained.[13]

4. That organization, under which a person or a family is called to the highest leadership, not by virtue of the will of the people, but by reason of circumstances that are independent of it, is called a monarchy; although in fact, it may also be a dyarchy; and this also applies to an elective monarchy, because in this case the underlying idea is not that the monarch draws his royal authority from the people, but that the people's choice is only a method of finding the right person, that is to say, the one that Providence has destined to rule.

5. Where it is assumed that the highest authority is bestowed by the people, is drawn from the people in assembly, we speak of a republic; the idea of government by the people may be more or less pronounced in it, according to whether the supreme head of the State, after once he is elected, is independent of the

[13] I need not enter into a discussion with those who are unable to grasp this, and therefore accuse me of political mysticism.

governing organs of the whole people, or must entirely subordinate himself to them.

6. Both in the republic and in the monarchy collective organs may exist beside the highest organ; that is, organs that embrace the individual members of the State. The true collective organ of this kind is the popular assembly. It is extremely ancient, but has not been able to maintain itself in larger States because the membership was too extensive, and it proved too difficult for its sessions to be held in definite places, so it was wrecked on the reality of life.

7. The collective organ of the people may, however, consist of an elected circle of members of the people who act in the place of the totality. Such a supreme organ that is wholly or partly elective is called a parliament. In what is called the upper house, other circumstances than election may determine the membership, and even in the so-called lower house all the members are not always counted.

2. *Kingship*

1. There is scarcely another institution that has done so much for the growth of culture as chieftainry, the consequence of the peculiar psychic constitution of humanity, of the suggestive influence of strong natures, and of the tremendous power which the recklessness and superiority of individual genius exercises over other persons; in other words, the consequence of supermankind and of the existence of overpoweringly strong natures. The spirit of history was obliged to use this means in order to advance mankind, even though it were by force and compulsion; for such strong natures are able to arouse and stir up the nations and to overcome a stagnant and halting evolution. Certain progressive movements of culture are always agreeable to them, and

in order to bring these movements about, they apply powerful methods which universal history would not otherwise know. Their effect may be likened to that of a volcanic eruption which does indeed work great destruction, but also raises up new lands, and brings them within the reach of culture.

2. The historical beginnings of chieftainry are probably originally to be found principally in bands of youths; at any rate, to a great extent, though not exclusively. In other ways, too, a bold warrior or powerful brigand could seize the authority of a chief. The dangers that threatened a community from outside, in particular, frequently gave rise to autocracy; for it required a strong and ingenious personality who could inspire the mass and hold it to withstand attacks from without. If once such an individual by victory has averted the external danger, he gains the confidence of the people, and there is no limit to his power within the nation; successes abroad have always served as a shield and cloak for the true tyrant.

3. When once the chieftain has obtained control, it will later be possible for him to surround himself with a religious nimbus. Provided the priests are not against him, it is easy for him to appear as the son of heaven, or of the sun, or as some kind of divine messenger, and to act as the exponent of the divine law. The result will be that the whole foundation of the law is displaced, and that the law will appear as an issue of his personality. Now he is in a position to sway and rule the people at will. Thenceforward, his subjects are mere tools in his hands, and the sacred relics of tradition dissolve under his power as soon as he desires it; as soon as he seeks the advantage of the State in something else.

The further presentation of chieftainry and the development of the idea among the different nations

does not lie within our province; but it is certainly our task to describe what chieftainry did for the development of culture, and how it later became kingship.

4. Its influence on culture undoubtedly lies mainly in this, that it protected the country against outside enemies, and thus secured the peace and quietude necessary to its inward development. In addition, it furthered the idea of the State and repressed the constant dissipation of the population by kin-revenge and self-vindication; for the chief wishes to maintain order and strives, in order to extend his power, to take the administration of justice entirely into his own hands. He is also inclined to develop the resources of the country; for the more it produces, the more his power and wealth are increased, as he alone controls the country's goods.

5. Chieftainry develops into kingship under the influence of two ideas: first, the idea that permits the State as well as the chief to be recognized as a personality. Even though the chief be the unrestricted representative of the State, yet the conception is unavoidable that he has the State in his hands only temporarily, and this again will give rise to the thought that he is only an organ of the State and that the latter, though it be temporarily embodied in him, is yet distinct from him.

The second important idea is that of duty, the thought that the advantage of the chief is not the sole consideration, and that, as an organ of the State, he must act for its benefit. This idea can only develop fully, of course, where the conception of morality is already grown. Nevertheless, it must appear in earlier times in the form of a religious commandment, wherever religious notions have become firm enough to allow clear principles and regulations to be formulated; for which, above all

things, a separate priesthood is necessary which as the exponent of the good may succeed in upholding religion, even when opposed to the ruler. Wherever this religion exists, it will require logical action in certain directions, and the indulgence of certain considerations, and will, therefore, also demand of the sovereign that he shall not give way to his moods. Thus, the way is levelled for further development; and whoever feels it his duty to care for the welfare of the people, who even takes an oath to do so, as, for instance, among the Aztecs, is no longer a chief but a king.

6. Kingship, like chieftainry, has a great task to perform in the development of culture, and this is accomplished in several ways.

(*a*) The person who acts is firmly established in his place, and can therefore influence certain cultural tendencies far more incisively and logically than can any other organ of the State. This, of course, also involves a great weakness: the personality of the sovereign becomes of extreme importance, and there are wide mental and psychic differences among personalities. One person may be fitted by nature to rule, while another lacks all talent in this direction. It has been attempted to solve this difficulty by making kingship elective; so that in this way a person could be chosen who had already proven by his deeds that he was suited to the office; but this system failed, because it led to corruption, and to constant upheavals, and to internal struggles. A modified form of elective kingship is found among some peoples, where of the members of the royal family, one is chosen to reign who appears to be particularly able; or, in some nations, a member who proves to be unfitted is deposed in favor of another member. But this system also gives rise to many disputes, quarrels, and enmities.

(*b*) Kingship brings with it a certain strengthening of the whole situation and frequently also greater protection against danger from without.

(*c*) It may prevent not only destructive movements among the people from gaining the upper hand, but also the appearance of powerful party elements which in the form of plutocracy, class spirit, and party tyranny are a hindrance to the real progress of the State.

(*d*) Kingship may create an intellectual centre, and advance both arts and sciences; though such an arrangement is not without its disadvantages; for the bad features of the patronage of a Mæcenus are often increased if such patronage exists by the grace of the king.

7. The principal remedy against the disadvantages of kingship, especially in as far as they relate to the contingency involved in getting an able personality for the head of the government, is to place other powers beside the king, such as the popular assembly or representatives of the people (to which we shall return later), and the ministry.

8. Like parliament and parliamentary government, the system of ministerial assistance and ministerial responsibility orginated in England. According to this system, the king does not act alone, but requires ministerial assistance, so that acts of the State are only valid if the minister also assigns them. This is important because it makes the minister co-responsible; hence, it will be difficult for the king to find a minister who will sign an act that contains an undeniable infringement of the constitution, and which would therefore involve the minister in difficulties. This is also significant where the parliamentary system does not exist, and much more so, of course, with parliamentary government.

9. In this way the outgrowths of the popular assembly and chieftainry have become the constitutional monarchy, in which, it is true, somewhat complicated institutions appear. But it is just these complications that, by the constant co-operation of a system of forces, serve to protect the State from excesses and narrow judgments, and to further the full consideration and investigation of all important factors entering into government.

3. *The Popular Assembly*

1. The popular assembly, one of the oldest of national institutions, a centre of justice even in the earliest ages, and at the same time the court before which all internal affairs were settled, put forth offshoots up until within modern times; even though it became impossible, with the extension of the power of the State, to maintain it in its purity. As all defenders of the popular assembly, even eventually J. J. Rousseau, have recognized, it is only suited in its true form to small unions; and if, under other conditions, it is desired to preserve its fundamental ideas it is necessary to transform it completely.

2. The idea of the popular assembly is this: it is the totality of the people, and if it determines something, its decision is not to be regarded as a resolution of the majority, but as the expression of the organic unity of the nation; for the spirit of the people is made manifest in it. Not until later is the conviction reached that here, too, it is the individual mind that rules, and a strong minority will sometimes make this very pronounced. But this knowledge does not ripen until later, when the conciousness of the individual personality has awakened.

3. The idea of the popular assembly is so mighty that even chieftainry, however much it might overthrow

the previous State organization, could not help making certain concessions to it; if, solely, because chieftainry itself was striving to be national and to live with the people. (Compare above, p. 234.)

4. The institution of the popular assembly can be retained in larger States in the form of the representative constitution. This may be in two ways. Either the nation is regarded as a whole that sends representatives from its midst, or it is the different classes of the people that appear for the nation. The latter is particularly the class-constitution which was frequent in the Middle Ages, but could not be maintained; because a constant mixing of the classes took place, and because the attitude of the classes became unavoidably the hotbed of selfish ambitions. This class-constitution has therefore no longer any future. It is dead, and its death was unavoidable; while representation of the whole arose, and not only thrived from the time of its origin, but has developed vigorously; for it has at the same time the great advantage that it represents a union of the people, and it is certainly the mission of our institutions not to breed discord but harmony of the whole. If factions and antagonistic tendencies develop in the nation, these will indeed appear in the creation of the parliament, but will not become fixed as they would under the dominion of the class-constitution. They will remain in constant motion, and new parties will continually form, and new disputes and reconciliations will continually appear.

5. That kind of representation under which the representation proceeds from the totality of the people arose in exemplary form in England, and has spread in modern times from there over nearly the whole domain of Christian civilization. It controls all monarchical States, with few exceptions, as well as republics, which, with its aid, have gained new vitality.

6. The representative assembly that is constituted in this way is designated by the general name of parliament; it must be borne in mind, however, that in most cases it was England's example that was followed, and this led to the formation of a second legislative department besides the elective parliament, called the House of Lords, the Upper Chamber, etc.; which is created according to entirely different principles, and is intended to represent, now the nobility, now the aristocracy of intellect or of wealth. It is a remnant of the former class system but a remnant that is peculiar in this, that only the highest classes have separate representation. In contrast to the elective parliament it is supposed to embody sometimes historical stability, sometimes those special tendencies that are bound up with wealth or with intellect.

7. An exposition of the law relating to parliamentary government and its history is not the object of this work. It will suffice to say here, that:

(*a*) The parliament belongs to those institutions by means of which the system of the three powers is to be carried out, legislation being kept distinctly separate from the judicial office, and administration of the law. It results that administration and justice are established on a firm and fixed foundation, on the basis of laws, from which there may be no departure. (Compare p. 229.)

(*b*) The parliament must contribute to the popularization of the government in the manner indicated on page 210: it will tend to bridge the chasm between the government and the governed.

(*c*) It is a means of educating the political understanding of the people, and of arousing and maintaining interest in public affairs.

8. The parliament acquires special significance when it is not only active in a legislative capacity, but inter-

venes directly or indirectly in administration also. This is the case with the so-called parliamentary system, the aim of which is that the highest officers, the ministers, should be determined by the parliamentary majority; so that the sovereign or president has not the power to appoint them according to his own choice. This restriction is of such far-reaching importance because the position of the ministers involves a tremendous limitation of the royal power; wherefore it is particularly incisive in its results, if the king or president cannot appoint these all-important personages according to his desire. The parliamentary system, therefore, still further lessens the authority of the sovereign, without, however, reducing it to a mere semblance; for it is still impossible for any important State act to take place without the king; and both the parliament and the ministers must come to an agreement with the king if anything whatever is to be accomplished. This is otherwise, it is true, in republics, where the president has only a suspensive veto. Note may also be made of the king's or president's power to dissolve the parliament, which, however, involves the immediate occurrence of a new election. But these elections may lead to a complete transformation of the parliament, entailing quite different conditions of majority rule, and hence also the appointment of new ministers.

9. From the representative system, however, there are always paths leading to the popular assembly; as, in fact, it is not rare to find an inclination toward earlier forms of development. The clearest embodiment of this is the referendum, that is, the institution according to which resolutions which have been framed by the government and parliament together, and which would therefore ordinarily become law, must still be submitted to the vote of the people. In this case, the

question is not discussed and decided, as in the popular assembly, by the people in conclave, but all the actual intellectual work and revision is done by the government and parliament. But in this way, the law can be put clearly before the people, who can then discuss it unceremoniously, and make known the result by vote, which can only be yes or no. The referendum is found in republican countries, for instance in Switzerland (also in the national constitution) and in some of the states in the American Union (not in the federal constitution of the United States). Not infrequently, however, doubtful cases have been submitted to the nation's vote without any such provision being found in the constitution (the plebiscite).

SECOND MAIN DIVISION

THE ACTIVITY OF THE STATE

A. GENERAL REMARKS

SECTION XXV

1. The activity of the State is activity for the welfare of the State, and the cultural interests of the nation; in fact, for the cultural interests of all humanity.

2. The activity of the State is divided into two very different kinds of operations; operations for the purpose of realizing and establishing the law, and other operations; thus, the administration of justice and the administration of the State. The difference is of incisive importance for the whole manner of the State's activity. Administration of the State is activity within

the limits of the law; administration of justice is activity in the service of the law. It follows that:

(*a*) The administration of the State must serve in great measure the commands of practicability and economic interests, observing only those restrictions that are imposed by the legal order: the law is the frame within which governmental policy is exerted.

(*b*) The administration of justice, on the other hand, must obey solely the commands of the law, and need only observe matters of practicability in as far as they are an element in the formation of the law.

3. The administration of the State is not within the scope of the philosophy of law, but belongs only to the general philosophy of culture; hence it need not concern us further here. The following only need be remarked:

(*a*) It is not universally applicable principles that determine which spheres the State will take into its own hands, and which it will leave to other authorities. This is governed by the principles of historical conditionality. The State must intervene wherever it is to be assumed that essential cultural tasks cannot be adequately accomplished by the activity of individuals. As regards the realization of the law, the State now controls practically the whole field. Administrative tasks, however, are frequently left to individual activity.

(*b*) Whether and to what extent the State may interfere with the activity of the individual is also a matter of historical conditionality. The doctrine of the rights of mankind is a doctrine of definite stages of culture, not a doctrine of permanent law.

4. As regards the administration of the State I would refer in addition to "Die Einführung in die Rechtswissenschaft" (3d edition, p. 147 f.)

B. THE ADMINISTRATION OF JUSTICE

SECTION XXVI

I. LEGAL PROCEDURE

1. *The Legal Procedure of the Civil Law*

(*a*) Fundamental Ideas.

1. The manner in which legal procedure grew out of peaceable regulation has already been explained (p. 63). The realization of the law is no longer the affair of the individual, but solely that of the State; and it is only through the mediation of the State that the individual can obtain his rights — his rights even in the face of others' opposition. The legal hindrances to which nature gives rise do not belong here; it is left to the individual to overcome them, and only in accordance with the varying principles of the police order can he appeal to the State to aid him in this connection; the opposition of another person, however, can only be overcome legally with the help of the State, unless it be permissible to overcome it in accordance with the principles of possession or necessary defense which were discussed on page 64.

This realization of the law through the State avoids all those imperfections which self-help involves.

(*a*) The State can obtain a correcter perception of a right in question than can the individual, who moreover is often blinded and prejudiced.

(*b*) The State is always the stronger when it is a question of overcoming an individual, and it is no longer a matter of importance which of the two parties

at variance is mightier; the State aids the weakest man and overcomes the strongest if the latter is in the wrong.

(*c*) The State is free from blind passions, and can devote itself unreservedly to the aims of the law; while the individual, in consequence of his passionate intentions, will act contrary to the law a hundred times, the State, in every single case, will be concerned only with the realization of the right.

2. This process of realization, however, produces still further cultural phenomena. The State will have to examine into who is right; for it will not interfere arbitrarily and blindly. And this leads to another important function which, contrary to the usual course, made itself felt even before the State realization of the law; namely, when individuals agreed to arbitration, and declared the decision thus given to be final.

If the State or an authority in arbitration asserts that *A* is in the right and *B* is in the wrong, the immediate consequence will be that the realization of the law conforms to this. If it does not go further, an important evil is not removed which gnaws at the heart of culture, and threatens to undermine the most earnest economic endeavors; this evil is the insecurity of legal relations. It is not alone the incompleteness of the realization of the law that hampers and hinders mankind, but the whole uncertainty of the condition of the law. Whoever desires to act in legal commerce must be able to build on a sure foundation, and especially to see his way clearly in regard to matters of property; if, in this connection, difficulties and discord arise, there must be a given means of settling them; and it must be such that it is known, once for all, what the right is. The procedure which in itself strives to ascertain the right and the wrong will gradually gain control of the

means of their establishment, in order to meet this need also; not at once, for the law will long restrict itself to the realization of the law, and will use the method of legal examination only for this purpose. It is true, however, that even at this point, it is frequently attempted to attain the further end indirectly. It is sought to bring about the desired security by compelling the parties, after the decision, to acknowledge it by an express legal act, and to submit to it by a legally binding declaration; thus it was in old Germanic law. From here, however, it is only a step to a further conception: the State decision is binding and determinative not only for the realization of the law, but altogether; it can no longer be questioned. This is brought about by the following legal device: the public authority of the State is mightier than private law; the State can not only realize law, but create law. If the State is given legislative power, it must also be given the power, in individual cases, through its organs, by virtue of its authoritative utterance, to abrogate the law: the State gives to the judge the key of the law; he can bind and dissolve the law.

3. Thereby the insecurity of the legal situation is finally removed, and it is now known what is right: for, whether the decision be right or not, yet from now on it is valid. It is either right, in which case everything is in order, or it is wrong, and then a corresponding displacement of the law occurs. This may appear to be a defect; for it is lamentable if, in consequence of judicial error, some one loses his rights, or if, for instance, some one who does not owe another anything, is suddenly made his debtor to the extent of 100,000 marks by judicial error; but for this single error, the valuable asset of legal security compensates, and it is worth so much that the unavoidable evils must be put

up with. With the attainment of legal security, human culture makes a considerable stride.

4. The principle of the final establishment of the law is indispensable, but it may exist even if certain modifications enter into it; inasmuch as the sphere of these exceptions is so clearly described that the rule remains unaffected. Now there are a number of cases in which the substantive right is so far outraged by the decision made that a departure from the rule appears to be advisable. Thus, in particular, if in the procedure of decision the judge has made grave mistakes, or if there were serious defects in the trial: especially if the decision was determined by a crime, false testimony, or perjury, or if the trial was incomplete owing to the impossibility of obtaining certain evidence.

In this connection, we speak of "restitution," and it has been carried out in various ways in our cultural systems of law. The consequence is, that the decision is overthrown, and it becomes possible to put another in its place.

5. Culture only requires that a legal certainty shall finally arise, not that it shall be achieved at the first attempt. At this point the institution of the appeal developed; that is, the possibility following the decision of one court, to obtain a second or third decision in such a way that the former decision is dissolved and another takes its place. The manner in which this institution has developed varies greatly, and rests on multifarious legal historical motives which must be elsewhere presented. It will suffice for our purpose here to say, that one of the main factors was chieftainry and the hierarchy of powers that it produced. The chief desired if possible to have the last word, and it was naturally flattering to his sense and desire of power if he thus succeeded in concentrating the administration

of justice. The legal character of the appeal, however, consists in this, that the first decision is conditionally given, and the reversal takes place as soon as a higher instance decides differently.

6. Legal procedure as a realization of justice has indeed its disadvantages and defects. The chief disadvantage is the unavoidable delay that it involves. Instead of a man's being able to obtain his rights immediately and directly, he must choose the circuitous route and apply to the State; and the judicial investigation of the matter may take considerable time. Instead of a rapid accomplishment of justice, we have a slow realization of justice, which often is almost equivalent to a denial of it. What advantages does the prospect of a just decision and subsequent powerful measures of realization offer, if I must submit to a delay of months and years, until perhaps the realization becomes merely theoretical, and the defendant has sunk so low financially that nothing can be had from him?

Our modern law of legal procedure is still fighting against this evil. We are endeavoring to reconcile the apparently irreconcilable contradiction that, on the one hand, the realization of justice should be swift and unhampered, and, on the other, that a just decision presupposes a thorough examination of the controversy.

The common civil procedure did not solve this difficulty; at least not in theory. It simply made the realization of justice dependent on the establishment of the law; so that it was necessary first to establish the law before it was possible to proceed to the realization of justice. The administration of justice did indeed seek to aid in many ways, but without any thoroughgoing principle. The great advance in modern procedure lies in this, that the realization of justice and the establishment of the law are separated; so that it is possible to proceed to

the realization of justice before the determinative establishment of the law has taken place. This is done by means of the preliminary enforcible judgment (*vorläufig vollstreckbares Urteil*), that is to say, that the judgment can be compulsorily realized even before its legal validity is established. This involves the disadvantage that the realization of justice sometimes goes astray, and leads to results that are at variance with true justice and with its certainty for the future. Momentous as this evil is, it must yet be accepted for the sake of the advantage that is gained if the plaintiff, on the basis of preliminary examinations or other circumstances that make his right probable, attains his end speedily.

The difficulty must then be solved in this way: if the realization of justice leads to results which do not agree with the future security of justice, an adjustment must take place; whatever the complainant has wrongfully acquired, he must restore, and it may be that he will also have to give the other party compensation.

7. But even with this solution there still remains something lacking; for at least until a provisional judgment is attained, the complainant's right is still unrealized. Three methods are employed to adjust this disagreement:

(*a*) The rapid forms of procedure, arrest, temporary disposition (*Verfügung*).

(*b*) The enforcible document: the debtor acknowledges his debt in an unquestionable declaration and the creditor is given the privilege, on the ground of the writing, to collect the debt—for the present, with a reservation of future settlement.

(*c*) The delay in time is balanced in the following way: the person against whom judgment is finally given is treated as if the judgment had been pronounced at the beginning of the proceeding, and as if the object which he

has to deliver had been left with him since then only as a loan. If, for instance, after six months, the judgment is against the defendent for the sum of 1,000 marks, it is to be regarded as if the judgment against him had been given immediately, and the sum had remained as a loan. He would not, indeed, have been allowed to retain it without interest; whence follows the necessity of interest during the procedural period of delay. The matter is treated in the same way if, after six months, the defendant is ordered to deliver up a thing; he is regarded as if he had been so ordered at the outset, and he had been allowed to retain the thing to administer it for the complainant; this gives rise to the duty of restoring the proceeds and the duty of handling such a thing with care.

It would, however, be a false interpretation of the idea if one should say that the judge's attitude must be as if he had given the judgment at the very beginning of the trial;[12] according to this view, the defendant would have to be ordered to deliver the thing up even if it had perished by chance, in the course of the proceeding. The correct view is rather this: the judge must indeed judge according to the condition of the thing at the time of the judgment, but he must then so turn the matter as if the judgment had been pronounced at the beginning of the proceedings, and the defendant in the meantime had been merely the guardian and administrator of the interests at issue.

8. In this way, of course, absolute perfection can never arise; but the policy of the law, like every policy, is the achievement of the possible, the attainment of what is attainable under the incompleteness of human

[12] This was the interpretation that Roman law maintained for a long time. In this instance, as in many other cases, Roman law was groping in the direction of the proper view.

conditions, and of what best accords with its final aims.

(*b*) Religion and Reason in Procedure.

1. Peaceable regulation is principally furthered by the worship of the divinity. The divinity is often the goddess of peace; she resists force and hates disputes and quarreling. So it happens that the efforts to obtain the settlement of legal claims and disputes without violence cling about divine service, and that the law of procedure is divine and ecclesiastical, before it becomes secular. The further exposition of this belongs to the universal history of the law; but here the part that worship played in the development of procedure must be explained.

2. Already on the plane of pure legal order, the priesthood attains great eminence; for even the law is not a human but a divine law. The creation of the law is a formation of the conditions as they conform and are agreeable to the divinity; and the exercise of the law corresponds to the divine will—at least as soon as religion has advanced to the point where many gods are merged into one unified divine authority.

Hence it is comprehensible that even at that time the law is made mainly by the priests, and that they endeavor to develop the divine will in all directions.

3. But this activity will become still more pronounced when society reaches a basis of peaceable adjustment, and when it is a question of opposing the individual assertion of the law. Here, of course, people will turn first to the priesthood when arbitration courts are desired; for they have the best knowledge of the law. But another reason is also combined with this. The priesthood represents the highest power; it possesses the authority to curse and expel the individual who

resists. This is a power that exceeds all others, and extends into eternity. Thus, of course, the intervention of the priesthood cannot be avoided, when quarrels and disputes arise, and it will fall more and more to the lot of the priests to solve legal questions, whether it be a matter of the realization of justice or the establishment of the law.

4. Moreover, the people of that time believed in the constant activity and intervention of the divinity for the individual; they assumed that the divine powers would never forsake the innocent; that they would not permit the wrong to triumph. Such a man, therefore, believed that the question of right and wrong was unconditionally solved with absolute certainty by divine intervention; so that all doubt disappeared, and man bowed to the infallible divine decision. This of course strengthened the priestly procedure; for it was just the priesthood that acted as the mediator in the individual's relation to the divinity, and appealed to him to reveal the celestial decision. Thus arose what is called the judgment of god (*Gottesurteil*).

5. The judgment of god is not unique. In other matters also the priesthood acted as the medium through which the divinity spoke; thus, for instance, in important State affairs, when responsible decisions were to be made, enlightenment was sought of the divinity; and it was supposed that the divine power could reveal to men the future. Thus arises the augury, that is, the totality of means used to discover the mystery of the future. It did not appear to the same extent in all the nations, but was pronounced among the star-interpreting Babylonians, the Etruscans, and consequently among the Romans; also among the Chinese.

Just as the future was spied out in this way, so too were the present and the past; the divinity said what was

right; it announced the circumstances that were determinative for justice; especially who had committed an evil deed and who was guilty of some crime was learned in this way.

6. Thus an abundance of divine judgments arose. They were, first, those that were closely connected with the augury; like the judgment by lot or the seer's power, the priest believing that in some manner he could discover the evil doer. Second, there were the divine judgments connected with the worship of the dead; it being supposed that a murdered man would point out his murderer, a belief which appears in various forms in the life of the nations: the wounds bleed if the murderer comes near, the bearers of the body suddenly become paralyzed at sight of the murderer, etc. Then there were the divine judgments proper: the accused, or sometimes the accuser, or both, were placed in relation to some material object so that this deified object might in some way make known their guilt or innocence; thus, for instance, there were the ordeals by fire, by water, and many others.

It is unjust to suppose that lying and deception, or even mere chance, played a large part in these judgments. There was certainly no intentional deception until all these institutions reached a state of decay, and the priesthood began a rapid decline. But even the effect of chance was limited; for frequently the elements of reason were also involved. The consciousness of guilt or innocence was an important factor in these tests; they assumed more and more the character of allowing the psychic emotions of the suspected person to appear, when he was confronted with the deified things of nature. Thus, for instance, the fact that the accused trembled, or in some other way expressed inward excitement, might be interpreted as arising from the

consciousness of guilt. As regards prophetic vision and the belief in the power of the dead, it may also be assumed that the reasonable motives that led to the conviction that one or another was guilty, so overcame the priests and the bearers of the dead that the cultural phenomena appeared just when consideration of the facts made one or another seem guilty; for it is a well-known psychic experience that such convictions affect our imaginative activity beneath the surface of our consciousness, and often we are as if possessed by reasonable ideas that grow up in us more or less unconsciously.

But, even if we must assume that the element of chance was large —and this can scarcely be doubted — yet, it must be taken into consideration that the sacrifice of the individual secured the peace of society; for the belief in the correctness of the divine judgment was so great that even the innocent man believed himself guilty, and thought that he had been caused to murder by some evil magic spell, or had attracted murderous spirits to himself.

Universal history often requires the individual to be thus sacrificed: the iron tread of progress tramples thousands underfoot. This is a terrible phenomenon which we must moderate and ameliorate, as far as possible, in the course of the development of culture. But here we must simply accept the ways of Divine Providence, in the consciousness that thus the progress of the world is accomplished; and we must realize that our modern criminal procedure also demands thousands of innocent victims, so liable to error are our methods of proof and conviction.

7. Procedure must advance beyond this stage, and become a procedure of reason, as soon as humanity ceases to believe in the basis of the earlier procedure; that is, as soon as men no longer assume that the divinity intervenes

in the government of the world for every individual, and gives him a good or bad testimonial. When once this belief has ceased, procedure must be along entirely different lines: the essential thing is, not that it should actually lead to objectively right results, but that society should recognize the dominion of the law in the administration of justice. Hence, as long as people believe in a divine procedure, it can be retained; but when once this belief is shaken, procedure must be built up on another foundation.

This cannot be done, however, until education has advanced so far that it is possible to obtain fairly sound results with the procedure of reason; and this is only possible if judges possess a certain degree of insight, if the impartiality of those who find the judgment is beyond doubt, and also if the conditions of life are such that it is possible, in the main, to reach a reasonable establishment of the necessary facts.

Until man has reached this point, the religious method of proof will continue to live in certain offshoots. It does not die easily, and can still be traced even today in certain institutions.

8. One of its outgrowths, for instance, is the oath, which means in reality that a man curses himself in the expectation of drawing down upon himself the curse of the divinity should he be in the wrong. This institution can maintain itself for a long time; for even if men no longer believe that the curse of God can be brought down upon us by the will and power of men, yet the belief that it is possible for a man, by appealing to the divinity, to place himself under the divine power of vengeance, is not so remote even from the man of today. In addition, compurgators were called; originally they were relatives; later, any persons of untarnished reputation.

The institution of divine judgment had one very evil result — the torture — one of the worst institutions that the erring human mind ever devised. The original idea was that, just as the divine judgment leaves the innocent persons untouched, so too they will be able to bear torture without succumbing. But even after this idea had gradually declined, torture still remained as a means of extorting testimony which was considered necessary, whether it was to extract a confession, or a statement, or to discover where a treasure was buried or the identity of accessories and confederates. Also this institution, eating like a canker into mankind, had to be overcome before modern procedure could arise.

9. In the procedure of today, however, we have first of all the far-reaching division between civil and criminal procedure. In earlier times there was no conception of this difference. Anyone with a grievance simply presented himself before the judge, whether he demanded the punishment of another, desired to have his property returned, or was anxious in one way or another to have some disagreement settled. Only gradually, after the State had properly grasped the criminal idea, was the great difference perceived in the activity of the State, whether it prosecuted an evil doer in the name of society, or whether it made it possible for the individual to establish and realize his rights.

(aa) *Courts*

1. Courts were originally either priestly courts, popular courts, or chieftains' courts. The priestly courts made an effort in favor of scientific form, and it is not by chance that the science of the law was first developed mainly in religious colleges. Sometimes the chieftains' courts imitated the priestly courts, and possibly competed with them as regards legal education. The

popular courts, on the other hand, always maintained a certain degree of informality, and their administration of the law was more or less simple and naïve, proceeding from the midst of the population that practised the law, without careful working out, and more unconsciously than on the basis of principle. Nevertheless, such courts sometimes rose to considerable eminence under the influence of certain unusually learned persons: take, for instance, the office of "law-man" in the Scandinavian law. Sometimes, too, the popular court developed into a court composed of persons from among the people who were considered to have special knowledge of the laws; and thus the popular court became an assessors' court (*Schöffengericht*).

2. With the growth of the priestly and chieftains' courts, in contrast to the popular courts, a law as understood by jurists (*Juristenrecht*) was developed as against the popular law (*Volksrecht*). Both belonged to customary law (*Gewohnheitsrecht*), but the juristic law grasped the matter with a logically trained understanding, the popular law with an instinctive general view of life (*Weltanschauung*).

3. As the development of the law is partly teleological, partly logical, no one kind of court will be the only right one; the proper court can only be formed by a combination of the popular court and the technical court. Both can contribute to the advance of the administration of justice. Technical law has an easily understood tendency toward exaggerated logic, unwholesome elaboration, sophistry, and quibbling. Popular law, on the contrary, is inclined to lose its balance, and to be so dominated by practical considerations that it goes to pieces. It is also in danger of losing itself in circumstantials, and since in it a firm core is lacking, to become the shuttlecock of momentary moods and passions.

4. We are right today in aiming at the establishment of both technical and popular courts, and in our endeavors to bring before the popular courts especially the disputes of the classes among themselves, and thus to reconcile class contradictions. Matters in which logical training is of more importance than the view of life are suited to the technical courts and to these only.

(*c*) The Philosophy of Legal Procedure.

1. The philosophy of civil procedure must bear in mind that the latter is a process for ascertaining the truth and realizing the law. Hence it must command all the means that serve to ascertain the truth; this procedure, to be sure, is only supposed to realize the right that the complainant wishes to have realized, and it is also true that the defendant may give in, and acknowledge a non-existent right. But this does not mean that in respect to the inquiry made by the judge, the parties have a right of disposition in the case; it only means that the judge is bound by the limits of that particular right, the realization of which the complainant desires; and further that the legally determinative disposition of the defendant may create a new legal basis between the parties, so that there need be no further dispute about the old right. On the other hand, within these limits, the judge must ascertain the full truth, and any impairment of his free examination is entirely inadmissible, and also unworthy of the judicial office.

2. If, notwithstanding, the judge, in certain respects, is dependent on the parties, this is the consequence of human conditions, and as such must be borne, but not extended beyond what is immediately necessary. Thus, it is particularly fitting if, at least in matters relating to property, the judge follows the corroborative declaration of the parties about facts. This and other trial

maxims (*Verhandlungsmaxime*), so called since the time of the exponents of Natural Law[14] in the nineteenth century, relate to the principle of usefulness, and are connected with the fact that in civil matters there is little possibility of the judge getting beyond the parties to the truth; although it must always be allowable for the judge to call and examine witnesses regardless of the parties.

3. The philosophy of legal procedure also involves the following: everyone must be given the opportunity, though with reservations and under regulations, of appealing to the judge, thus producing the legal relation calling for procedure. This may lead to abuses which, if they become frequent, may be corrected by the rules of procedure in one manner or another. But, in general, it is not possible to dispense with the rule that anyone is competent to bring an action, and, especially, the assumption is entirely inadmissible that a man who is in the right occupies a different procedural position from one who is in the wrong; being right or wrong can only influence the content of the judicial judgment, but cannot alter the person's position as to his procedural rights. All logical wranglings that have been indulged in regard to this matter must be rejected. Procedure is an institution for the purpose of realizing the law; and this institution must operate with certain means; and one of these is the principle that, apart from any consideration of right or wrong, everyone can obtain a hearing before the judge, and can bring an action. A metaphysic of procedure that assumes that the entitled subject has a so-called claim to legal protection is wrong from the beginning. The correct fundamental idea is rather that of the separation of civil procedure (*Zivilprozess*) from civil law (*Zivilrecht*).

[14] "Arch. f. Rechtsphilos." I, p. 503 f.

The realization and the establishment of the civil law is the end at which the State aims, when it accords the right of procedure to an unentitled as well as to an entitled subject.

4. If we go a step farther, in order to characterize the right of every individual to bring an action, we must say that it belongs to the class of rights in one's own person (*Persönlichkeitsrecht*); it is the personality that asserts himself in the action.

As regards execution (*Vollstreckung*), a particular factor applies, in that not everyone by merely bringing an action can resort to execution; but only one who has a so-called title of execution (*Vollstreckungstitel*) (a judgment and such like).

5. This personal right (*Persönlichkeitsrecht*) gives rise, by reason of a definite procedural assertion of the complainant, to a legal relation between the complainant and the defendant, the legal relation of civil procedure.

This has frequently been misunderstood, and wrong ideas have been accepted which has made the matter somewhat obscure.

It has been said that every person has a claim against the State to be heard by the State in his procedural assertions, and to bring an action against anyone. This rests on an entire misunderstanding of the nature of a claim (discussed on page 84). Not everything that I may do, can be included in the idea of a claim; not even if thereby I am protected from the interference of others. It is a claim only if a special relation exists on the basis of which a certain activity can be demanded. But, if it is a question of a general right which must be respected by everybody, especially by the State, the idea of a claim is entirely unsuitable; for the necessity that the person of the complainant should be recognized through the judge rests on the right of personality;

just as the necessity that property should be recognized rests on the nature of ownership.

6. As regards the form of procedure, it aims mainly at being practical. Yet here, too, it is possible to explain certain fundamental ideas which recur in the legal systems of our people.

(*a*) There is a question whether procedure is to be treated as divisable, or as a unity: the former in this way, that the procedure ceases with the term and must be recalled to life by a new act, until finally the object is attained. Thus, the progress of the case is from judgment to judgment, and through a series of judgments — the procedure being constantly closed and reopened.

In contrast to this, there is the notion of procedural unity; so that the different terms are only parts of one great whole. The result is that a final judgment is not given till the end; orders being entered in the meantime, which generally can be changed by the courts; and that judgments before the close of the procedure (*Zwischenurteile*) exist only as exceptions, where questions are involved, whose ultimate settlement is of urgent interest to both parties.

Modern law tends towards the second view, and that is the one accepted by German legislation. It has the advantage, that in all inquiries into the case, the latest developments are at the judge's command, and he is thus able from examination to examination to get nearer to the truth; whereas, otherwise, he is bound by earlier judgments and cannot make use of better knowledge. In another respect, also, this method is to be preferred, for by it the examination is better apprehended, and by unification a better result is made possible.

(*b*) Adversarial procedure and inquisitorial procedure (*Partei- und Untersuchungs-prozess*) are two further poles in the treatment of this subject. Adversarial (or

party) procedure is an intellectual conflict of two opposing persons, and in their contest they bring forward their reasons and resources. In inquisitorial procedure, the judge alone is the determinative agency, and the others involved are solely participants who can take part in one way or another, but cannot oppose one another nor control the course of the procedure. Each system has its advantages. In civil procedure, party-process is generally to be preferred; because everything bearing on the matter is best brought to the surface, just by the conflict between two persons with opposing interests. This involves, however, the considerable inconvenience, that a decision is brought about only between two persons, wherefore, when a number of persons are affected, inquisitorial procedure proves to be especially practical. A combination of the two methods is seen in the party process with a number of persons on one side, where each may take part in the proceedings.

Our civil procedure is generally party procedure; yet occasional cases are not lacking in which inquisitorial procedure is used.

(*c*) The form of the civil procedure may be governed by the principle that a decision can only follow when both sides participate. This rests on the principle of combat, which requires two combatants; for even if the defendant surrenders at once, he must yet be present in order to say so. Many systems of law start from this point of view, at the same time regarding it as the sacred duty of the citizen to take part in the process, and not to absent himself. This is connected with the whole system of popular assembly, where it is customary in the development of the relations of society to meet in certain public unions (as is still the case in the African palaver, etc., and as formerly, in the German national assembly). There, both complainant and defendant are

present; and it follows, as a matter of course, that everyone who is called in this way must take part in the procedure, if he wishes to be considered a legal member of the national community. Whoever does not do so is expelled from the community altogether.

This principle is later replaced by another: the process does, indeed, remain a conflict; but just as the defendant may capitulate, so too he may remain away and his absence is considered equivalent to a declaration that he is defeated and that he concurs in his defeat. According to a third system, if the defendant does not appear he neither capitulates nor declares himself defeated, but he does not meet the attack of the complainant with a counter-attack.

The latter is the method represented in most modern cultural systems of law. In this way, justice is best done to the complainant without declaring that the defendant's absence is a complete acknowledgment, which often does not agree with the facts. On the other hand, it is comprehensible that in such a case the defendant's failure to appear should be construed, as far as possible, in favor of the complainant. Nevertheless, it is going too far if in all cases the facts of the complaint are regarded as acknowledged, as in German civil procedure.

For the rest, the procedure pertaining to default (*Versäumungsverfahren*) does not belong to the general philosophy of law, but to the special legal policy of the time and the nation; hence it need not be further discussed here.

(*d*) Proof Founded on Reason.

1. If proof founded on reason (*Vernunftbeweis*) is accepted, care must be taken that means of proof be not lacking. A great discovery which considerably advanced

procedure is the document (*Urkunde*), that is, the means of putting a declaration of thoughts or will in an unchangeable form, to petrify them so that they are secured for all ages. The document developed with the art of writing, as a support for the memory, as a means of intercourse between those who cannot associate with one another personally, and finally as a means of establishing what has once been said, for future evidence. The document, it is true, is therefore only essential for legal dealing which is carried on principally according to the intention of men, not for illegal commerce; as whoever is engaged in illegalities is, on the contrary, anxious to obliterate the traces of his deeds. In this case, other expedients must be sought. Human activity is here replaced by nature, which can only be partly mastered by man. The farther we penetrate in the knowledge of nature, the less will the culprit be able to escape our investigations; for a number of natural events will arise from the deed which the perpetrator cannot avoid, and which finally betray him. In this respect the inquiring mind will find ever new forces at its disposal. (Compare p. 292.)

2. Another aid is testimony, which is important for illegal as well as for legal acts, because in both cases, things are perceived which serve to retain past events. In legal dealing testimony comes under consideration in a special way. Just as the document can be used as a means of establishment of facts, so too can testimony be used, witnesses of a transaction being called for this purpose. This calling of witnesses has a wide historical background which must be dealt with in the universal history of law.

It is of the greatest importance that the persons so called should possess the ability to perceive to the full extent, that they should be able to retain what they

have perceived, and that they should be desirous of recounting it correctly.

3. In all these directions the means of proof must not be overestimated; and, in particular, it leads to complete injustice if the psychology of testimony is not grasped; and if it is not recognized that perceptions often produce false impressions, so that what is entirely incorrect is not rarely conscientiously asserted and even sworn to. In this respect, tremendous errors have been made, and the injustice that they have wrought is no slighter than the injustice of the time when the ordeal was depended upon. Just as in earlier periods people finally became free from their belief in the efficacy of an appeal to heaven, in their effort to advance toward truth and reason, so today we must be on our guard against blind confidence in testimony and, by carefully and psychologically examining it, seek to get at the truth. Testimony is merely the raw material out of which the judge must construct the truth.

On the other hand, testimony has this advantage over inanimate means of proof, that witnesses can be interrogated and urged to explain doubtful points in their testimony. Hence, it is of particular importance that the parties concerned should be present, and should be permitted to question the witnesses.

(*e*) Execution and Bankruptcy.

1. The realization of justice also seeks to bring about the result that the law desires without any effort on the part of the defendant. It is best arranged if it —

(*a*) operates firmly and surely;

(*b*) is able to realize the rights of the complainant in all its particulars;

(*c*) is at the same time humane, and does not sacrifice the man to the law.

2. There are cases in which the participation of the defendant cannot be dispensed with; the law is then obliged to act upon his will.

3. Whether the execution affects only property or also the person varies in history. With us the former is the case, but for centuries the latter was usual and predominant.

4. The method of converting the property into money (with the aid of the judicial pledge right) belongs to the technic of the law.

5. Bankruptcy is an institution of settlement, whereby the harshness of chance is modified, and by means of which it is intended to bring about the result, that interests which are equal in the law shall receive as far as possible equal attention and development. Two points of view in particular come under consideration. The plurality of creditors who proceed against the debtor would otherwise have to depend on a single execution (*Einzelvollstreckung*). This single execution is thoroughly justified if there is enough property to allow of every creditor's gaining full satisfaction; hence it is also thoroughly justifiable if, in this matter, German procedure starts from the system of pledge rights, and gives the first pledgee the preference before his successors: then a creditor can fall upon one or another piece of the debtor's property in order to gain his satisfaction from it. But if the debtor's financial condition is so bad that not all the creditors can be fully satisfied, then this system leads to the evil result that one creditor will be completely covered, and another will obtain nothing; and, further, that in this respect, it is solely chance that decides, and whoever comes first claims the property. There may be a certain justification for this, inasmuch as in all systems of law diligence in following up a claim plays a part. But it is not just that this circumstance should have so great an effect; for such

diligence is often synonymous with ruthlessness and harshness, and it certainly cannot be required of everyone that he be a shrewd business man.

6. Hence, in such cases, it is justifiable that the preference should not be given to the first comer; but that the system of equality should decide that all the creditors should stand equal, should be subject to the same advantages and disadvantages, and that if there is a loss, it should be borne by all alike; in other words, that not the principle of the pledge right but that of sequestration (*Beschlagsrechtsprinzip*) should apply.

This principle is the fundamental basis of bankruptcy and the one to which this institution chiefly owes its origin.

7. A second point of view is the following. The objects that constitute the property usually stand in such close relation to one another that if they are separated and isolated considerable loss is entailed; for the advantage that lies in this close cohesion of all the proprietary objects ceases. It is therefore advisable to proceed as follows: if the whole property of the debtor is intended to serve the creditors, an organization is formed to turn the property to account, and reduce it to money; and thus, partly by administration, partly by the sale of the whole or portions, the advantage of cohesion is preserved. In this way, greater losses are avoided than the circumstances of the case require.

8. This leads of course to a co-operative form of the relation among the creditors; for such an administration of property and realization presupposes unified decision and action, and this result can only be attained by a formal organization of the individual creditors. This is the second aspect of insolvency. Instead of co-operative development, there is still another possibility — State attachment (*Beschlag*) and State admin-

istration and realization; so that the creditors appear only as applicants and the whole management is carried out by the State itself. This form of bankruptcy is also represented in the legal systems of the nations. It is not, of course, impossible and may also accomplish the desired ends, but the former method is to be preferred, because the creditors will act with greater expert knowledge and better understanding of business life. It is always more advantageous if those who are themselves concerned take the matter into their hands, so that the activity of the State is limited merely to the supervision that is necessary to prevent the interests of third persons from being neglected.

9. Accordingly, bankruptcy is no longer State execution, but a kind of regulated self-help that takes place under so many precautionary measures that it causes no uneasiness.

2. *Administrative Jurisdiction*

1. Also the question whether the State or some organ subject to the State has overstepped the bounds of the law in its administrative activity can be decided by legal procedure. For this purpose, there are special administrative courts, the activity of which differs in some particulars from that of the civil courts.

2. Also the State's failure to act may come before the administrative court if action would have been a duty.

3. The details of this subject belong to legal technic. (Compare "Einführung in die Rechtswissenschaft," (3d ed.), p. 194.)

SECTION XXVII

II. CRIMINAL LAW

1. *Criminal Law in the Proper Sense*

(*a*) Kin-Revenge (*Blutrache*).

1. Punishment is expiation, satisfaction, retaliation. If a man does wrong to another, he does it from an exaggeration of his own personality, and this aggressiveness must be restrained and the man made to realize that his desires do not rule the world, but rather that the interests of the community are determinative. Hence, the nature of punishment is influence brought to bear on the individual, in order to bring to his consciousness the conditionality of his existence, and to keep it within its limits.

This is done by the infliction of suffering, for suffering has the following effect: it cures the individual of his individualistic excess; and, on the other side, it makes it impossible for him to continue in such an excess to the injury of others.

2. There are ages in which this element of punishment alone appears, or at least plays a principal part; thus it is in periods when kin-revenge is practised. The individual is killed, maimed, or otherwise forced back into his bounds, because he has trespassed on the domains of the law. The wrong that is thus expiated is especially the wrong that individuals have suffered; it is the injured individual, his family, his clan, that consider themselves wronged. Injury is weighed against injury, and it is said: because the injured family has suffered, therefore the person who inflicted the injury and his family must suffer.

3. This one-sided view of criminal justice later makes way for its consideration in the social aspect. The perpetrator is not punished because he has done wrong to an individual, but because he has injured society as a whole, and has sown the seed of evil deeds in the community. Not only the immediate consequence of the deed enters into consideration, but the whole moral injury that human society has suffered: the bad example that corrupts others, the indignation felt that the evil should triumph over and oppress the good, the great insecurity of the conditions that thus arise — all these emanate originally from one thought that the evil deed brings about, or at least may bring about a lower state of general moral life. Hence, if in such a case the deed is to be expiated, and the criminal punished, the aim is not only to restrain and paralyze his egoism, but also to reawaken to complete purity the moral feeling that has suffered injury; and this is done by the suffering inflicted on the criminal; partly because his egoism is thus restrained, and that he may be made to feel the supremacy of society; and partly because just suffering has a conciliating power, and that it is assumed of a man who thus suffers that he will regain his position in society, and no longer remain in the same state of depravity as formerly.[15]

4. The system of kin-revenge has great defects:

(*a*) It is a disrupting element in national life. The discord between families that are at enmity continually stirs up and weakens the State, and great endeavors must give way to individual revenge.

(*b*) A feeling of vast insecurity must take possession of the people, and cannot fail to hinder to a great extent the work of culture. A tremendous amount of human

[15] Compare my treatise, "Wesen der Strafe," 1888. Compare also *Berolsheimer*, "Rechts- und Wirtschaftsphilosophie," V, p. 3 ff.

force is absorbed by the constant questions and problems of revenge; and the fear and terror that seizes upon the population must paralyze steady activity.

(*c*) One of its worst evils is that kin-revenge is not limited to the actual criminal; and, further, that one such act of revenge immediately begets a similar act, so that an endless chain of victims follows.

5. On the other hand, this institution has its ennobling sides. Self-esteem is increased; personality is raised above the swamp of material ambitions, and inspired with courage; and, giving up everything for an idea, the individual devotes himself to aims that are outside the common impulses of life. This is why attempts to abolish kin-revenge met with such resistance, necessitating a disguised and roundabout method of attack before the institution could be rooted out.

6. Periods of blood-revenge are so much the worse, because this revenge is carried out even when the member of the family has not in fact been killed. The idea is quite general, in such times, that death may be caused by a magic spell; and if a man dies unaccountably, efforts are at once made to find out from whom the evil influence came. Herein lies the fearfulness of this institution, in that it contains far too few rational elements, and rests rather on uncertain belief, blind passion, and fervent worship of the dead, a mixture that works much evil on humanity. Moreover, the belief in magic is not merely a matter of imagination; one who believes himself to have been bewitched is so firmly convinced of the fact that it acts as an auto-suggestion and he dies.

The effect of this superstition is barely counteracted by the belief that not only men, but also demons, may bring about death; so that the fear and hatred that

would otherwise have been directed at persons was thus transferred to these imaginary beings. This was one of the most successful influences of the belief in demons, which thus greatly reduced the suffering of nations.

Then the idea made its appearance that by counter magic the power of the evil elements could be turned aside; and the magicians were appealed to, who, gifted with supernatural powers, seemed to be able to protect the unhappy victims. And so the magician became the comforter of the man who believed himself to be bewitched.

All these circumstances combined to moderate kin-revenge, and to gain a greater influence for priestly law; they were promotive of culture, and therefore to be valued.

7. But the idea that was most destructive in its effect on kin-revenge was that one might allow his revenge to be purchased, a materialistic idea in itself, but one with an ideal background. Not the gain of the family whose blood has been shed was considered the main thing, but the frightful bleeding of the perpetrator's family; and it was this that struck much deeper into national life than the death of a single member of a family. A man allowed himself to be appeased by weregild, not because he and his family desired money and possessions, but because they thus took from the family of the criminal what it held dearest, the property that it had acquired with much labor.

This does not mean that the idea of material gain was always remote. It was merely not the first motive. Once the practice had become rooted in national life, it was of course only one step further to the reign of avaricious instincts. Gradually and silently, this came to be the case, until finally people were perfectly conscious of it, and were no longer ashamed of it, since it

had come down to them with the traditions of their forefathers. So it came that from case to case there was bargaining about the value of the dead person, with the idea of revenge still as a motive in the background. At first it rested with the family to accept the weregild or not; and they were able to demand as high a sum as they felt their threat to resort to bloodshed would compel the other family to pay.

8. Gradually, however, a definite amount came to be customary. By degrees everything grew to be more or less regulated by custom; and in this practice, too, the idea that one must do what was usual could not be rejected. Finally, therefore, the family was regarded as bound to accept the weregild, in certain cases at least. In this way the acquisitive instinct dulled the desire for revenge and cruelty, and thus it became a means of furthering human culture; for the transition to State criminal law occurs more easily after kin-revenge is pacified. Finally the State itself can take over the composition system and by appropriating part of the money, and paying a part to those injured, can give support to the State criminal law; as was the case, for instance, in the Italian systems of law, in which, after the weregild had degenerated into confiscation of property, it was divided betwen the State and the persons injured.

9. Not only was it possible, thus, to strike at the very backbone of the perpetrator's family, but, in addition, extreme humiliation and contrition could be required of them. And this was done with excessive refinement: money and property, which were the main things to the avengers, were forced more and more into the background in favor of elements of mental affliction; and apologies, humiliation, and honorable amends were required before reconciliation was permitted.

10. In this way the revenge idea settled into the idea of punishment. In all these acts of humiliation, the avenger played but a passive part. He might indeed gloat over his antagonist's abasement, but this was not merely an individual satisfaction; it was also an echo of the thought that the impious nature of an evil deed was destroyed by profound penance, and that purification of the soul led to atonement and deliverance.

It is natural that religion should have assumed control of these elements; and so we soon find the priesthood eagerly endeavoring to bring about reconciliation, and we also find its religious accompaniments. Thus the penitents were obliged to submit to certain religious penances, and to look for redemption with the aid of divine grace.

Thus this element goes deep into the foundations of morality, and draws out a variety of redeeming elements: the original character of kin-revenge is gradually dissipated, and loses its severity and tenacity.

11. Another institution that aided in destroying kin-revenge was the right of sanctuary which we find in the legal systems of all the nations.[16]

Sanctuary in the widest sense is a certain recognized relation of the perpetrator or his family that protects him from kin-revenge. The relation may be one of place, of time, of person, or it may rest on other connections. The underlying idea is always the same, that limits are set to the kin-revenge.

We speak chiefly of local sanctuary. It was first to be recognized, and, in fact, could not be overlooked in historical research. Certain places or localities demand a consecrated peace. Any deed of violence, however

[16] Of first importance for reference in this connection is the treatise of my pupil, Hellwig, "Asylrecht der Naturvölker," (1903).

justifiable, committed there, is thought to violate the sacredness of the place. This is comprehensible, for certain practices and customs require complete quiet and isolation, and individual absorption in certain trains of thought and ideas. Every disturbance would hinder the practice and drive away the good spirits; so much the more, of course, would this be the case, if it were believed that if any deed of violence were committed, infinite evil might thus be wrought to mankind.

Hence it follows as a matter of course, that sanctuary is intimately connected with religious practices, and that just places of worship, in particular, places where the spirits of the dead were supposed to tarry, were places of sanctuary. Such were the temples, sacred groves, tombs, etc., and also places of judgment, the judge's house, the places where the ruler lived, the immediate neighborhood of the chief, and elsewhere.

Sanctuary may also be temporary (*Treuga*), or personal (*Anaya*), things that lie within the province of the universal history of law.

The whole idea of sanctuary rests on the above opposition of the legal order and peaceable regulation (p. 63). Sanctuary is an institution of peaceable regulation which is at variance with the carrying out of what the law permits or commands; and thus leads out and beyond the latter, powerful though it be. Here, too, we find peace and law to be the two factors which, in their mutual effect, have guided evolution onward. Peace against law, law against peace; and, as regards criminal law in particular, it was the task of peaceable regulation to destroy the element of revenge, as far as possible, and thus gradually to free atonement from its impure component part, and to purify and clarify the institution of the law.

(*b*) Internal and External Aspect of Acts.

The psychic conditions of an act are originally immaterial, or rather, they form no decisive motives. Their origin and character are not recognized. Even if one kills another accidentally according to our ideas, according to the view held by primitive peoples, this accident is really the expression of the spirit that rules the man; for the belief of early times was, that a man has many souls, and that it is one of these that acts in such a case. The individual must, of course, answer for the deed; whatever his soul does, he does. The principle that only the objective deed, and not the psychic conditions as well, is decisive has therefore a deeper background. Of course, the difference cannot remain permanently unrecognized: what is intentional and what is unintentional cannot be regarded as equal. The man who lies in ambush for another and kills him cannot be placed on the same plane as the the one who kills another in a wrestling match. The conscious evil spirit that leads to murder, and the unconscious demon that gives the hand an unfortunate turn in a game, both, indeed, rule in the man who kills, but they cannot be compared with each other. Even in the time when kin-revenge was customary a distinction had to be made. People were more inclined to be lenient in the accidental case and to accept atonement for the bloodshed than when the intention to murder was shamelessly clear. In this way, intentional deeds were contrasted with unintentional acts, and the two were differently treated. Thus it remained for a long time. Other differences in guilt could only be perceived after further progress had been made in refinement. The idea that a wicked demon in man governed contingency had to decline gradually; gradually, because its effects, by virtue of the principle of continuity, were still felt for a long time; and it was

a long time before the idea that even unintentional acts must be punished could be overcome. But, by degrees, the question had of necessity to arise: Did the man do everything that he should do under normal circumstances, or did he act in a manner inimical to life? The evil demon had in time to be reduced to what is contrary to the conditions of life in a man's thought and action. If you have done everything that one would do under ordinary circumstances, then the act can no longer be attributed to a demon within, and the consequences of the act come more and more to be recognized as contingent, that is, as elements not inherent in the act, and merely connected with it externally. It is no longer the demon in man, but the demon of fate that brings about the result; and for this the individual cannot be made responsible. Thus gradually arises one of the most difficult conceptions of the law of liability — negligence; and this gives rise to the principle: one is always liable for intentional misdeeds, but for unintentional ones only in case of negligence; that is, if one has not used the necessary care to act without disadvantage to mankind.

(*c*) State Criminal Law.

(*aa*) General Remarks.

State criminal law did not develop in one, but in five ways, and like most historical institutions has several sources.

1. From remote ages the principle has prevailed that kin-revenge could only be practised outside the family, never among relatives. Hence, if a man injured or killed a relative, there could be no question of kin-revenge; for that would have resulted in the family's turning against and devastating itself, a consequence entirely opposed to the idea of kin-revenge which aimed

at the preservation and advancement of the family in question. There was, therefore, no alternative in such cases but to punish the offender, or turn him out of the family. The latter course would indeed have impoverished the family, but that the idea was conceived of allowing the exile to return, so that his absence was merely temporary. Exile was regarded more as a means of compelling the offender by atonement to make his own return to the family possible. This atonement was a family atonement, quite different from kin-revenge atonement; its purpose was not to avert bloodshed by purchase, but to lead the unworthy member of the family back to it. This was the case where only one family was in question. Then, when several families combined and formed one union, it was not unnatural that the same idea should be applied to this union, and that kin-revenge within its circle should cease, even when the persons concerned belonged to different families. In this way, by the association of several families, the State was formed, and thus it followed that what had formerly been peculiar to the association formed by several families should also be adopted by the State type of association. Accordingly, kin-revenge within the State automatically ceased. This development, it is true, did not always proceed with such logical definiteness. The relationship among the kindred was not always sufficiently intimate, and kin-revenge between the families was generally too powerful to allow this institution as a whole to end immediately; it continued in many instances up into the period of highly developed State life before it ran its course.

2. Another development occurred thus: the State concerns itself with the institution of kin-revenge; it recognizes it under certain circumstances; but it requires definite precautionary measures, and especially

that the necessity of kin-revenge should first be established by the State and should be carried out under its supervision and control. Frequently a change took place whereby the carrying out of revenge was undertaken by an organ of the State, not by the avenger himself; the place of the avenger was taken by the executioner.

3. A third development was brought about by the influence of the divine law; for every misdeed was also considered an offense against the deity; in order to turn aside his wrath, it was necessary to make an atonement, which in this case was divine atonement. To this idea was linked another; namely, that the atonement was also in the interest of the State; for serious crimes involved not only those immediately injured but also the whole State. This was naturally the case, first in regard to treason and other offenses that placed the existence of the State in jeopardy. It was then extended to include serious murderous acts and other things that threatened to weaken the State.

Here, too, chieftainry played an important part, for it meant, of course, an increase of the chieftain's power if the authority to punish were transferred to him and kin-revenge among the families were suppressed. So it came about that strong, autocratic chieftains took the authority to punish into their own hands.

4. The right of sanctuary also had an important bearing on this matter. Whoever had sought sanctuary stood under the protection of the wardens and keepers of the place; thus, under the protection of the priests or judges. It is obvious that they in turn interfered and either shielded the fugitive in the sanctuary, or declared him to be unworthy of it. Thus, authority to examine into the matter developed among those who guarded the sanctuary, and this too was one of the sources of churchly or State criminal law.

5. Through the rise of a State criminal law, the idea of punishment was purified and freed from subjective adjuncts. The still dominant idea of individual revenge was gradually rejected. People did not proceed against the offender because of individual feeling against him, but solely from the social conviction that some reaction must take place. Whether the idea was a religious one, and the punishment aimed at appeasing the anger of the divinity; whether the chieftain punished in order to wrest kin-revenge from the hands of a powerful family; or whether the object was to produce order and quiet in the family; in any case, the idea of revenge was dropped. Even where, as in the vengeance of the gods, it still flourished to a certain extent, it was so refined and attenuated that it lost more and more of its original character; for, even if punishment was inflicted in the conviction of divine anger; even if the offender was removed in order to pacify the gods, and people looked tremblingly up to the godhead who threatened to punish a whole region for the crime of an individual; yet, in all these cases, religious feeling was stronger than the feeling of revenge. And even though people might believe in an angry and vengeful god, yet he stood far too high above mankind for them to presume to share his anger.

6. With this appears the second idea of criminal justice: namely, that the personality shall be forced back, because his action has poisoned the whole social group and threatened its existence. Only traces of this idea appeared formerly. That in the development of the law the offender was forced to retreat within his own boundaries, first occurred under the egoistic sentiment of revenge. Here, too, universal history resorted to artificial means to obtain its ends. The idea that the offender must be repressed because he had injured

society still lay dormant; at most, the feelings of the injured family may have slightly vibrated with the suspicion that not they alone, but all their kindred, and the whole community, had suffered. This fundamental idea, of which only slight signs were seen in the time of kin-revenge, now became the leading principle. To it was added a second — greater consideration of the motive of the act. Even though in the time of kin-revenge the intentional deed had been distinguished from the unintentional act, yet the great principal significance of inner guilt was still little recognized. This is easily comprehensible, because the practice of kin-revenge was born of personal feeling, and, in addition, the idea of an evil spirit that dominated the guiltless offender was still present.

But as soon as the principle was established that the offender was punishable because he opposed society, the conviction that his opposition was brought about just by his culpable act was bound to become of determinative importance. Why is it that the deed poisons society? Because guilt produces guilt; because guilty action begets the fear of further guilty action; because the immorality that lies in the deed threatens to destroy the whole structure of society. What was formerly a subordinate factor here becomes the chief element. It is the reprehensibleness, the unworthiness, the contemptibility expressed in the deed that is determinative.

7. This conviction is fostered and strengthened by religious influence; for wherever in culture the conception of religion became deeper, the idea of the consecrated and unconsecrated, the godly and the ungodly, the holy and unholy, necessarily appeared. In whatever colors the notion first parades, it is still the idea of guilt, and of moral worthiness or unworthiness, that is prominent in the judgment of the deed.

8. This is one of the greatest strides of criminal law. The deed is not judged merely by its external, but chiefly by its internal aspect, and the reaction adapts itself to this judgment. Thus, instead of vengeful retribution, we get refined justice; and punishment assumes the character of an evil, the purpose of which is to force the offender back into his place, and by the purifying power of suffering to destroy the immoral poison that he has poured into society.

(*bb*) Justice.

1. The justification of punishment depends on this: that we do not regard man merely as a creature of nature; but assume that his soul forms a concentrated unity expressed in the ego; that he is an autocrat in the realm of the will; and that he can make laws by virtue of which he acts thus or otherwise. There could be no conception of justice, if man were simply a creature of nature, following natural instincts like a machine, so that there could be no question of guilt. There can be no compromise with this view, although the attempt has been made; for instance, by Merkel and some of his successors. They assert that although man is determined in his resolves, that is, although he is forced to his acts by an inner series of causes, he can yet be praised or blamed, and can still be punished; for there is liberty wherever external compulsion is lacking. This is entirely untenable[17] and rests on a complete confusion of the primary ideas of psychology; liberty does not consist in a man's being proof against external influences: a clock or a machine that is so adjusted to move without external influence is also not free. Responsible freedom is only possible if man himself is the lawgiver, in order to choose

[17] Compare "Moderne Rechtsprobleme," p. 34 f.

one thing or another; and though we can praise a good machine or blame a bad one, to punish a machine would be similar to the action of a child that destroys her doll if she does not like its mechanical movements. I have discussed all this at such length in my "Moderne Rechtsprobleme" that I need not return to it.[18]

2. In recent years it has been believed possible to advance criminal law a step further and to discard the idea of justice altogether. This was attempted in two directions, it being asserted that the offender, like every man, was only a creature of nature that acts according to natural instincts by virtue of a constant causal order. Hence, punishment, as we understand it, was absurd, mediæval, and contrary to the spirit of modern times. Secondly, it was emphasized that the individual is only the result of his environment, and the product of society. The whole evil could only be combated by altering social conditions, or by making another man of the offender, or by excluding him from society altogether. In this way, the notion was arrived at of the necessity of social improvement, and further, the requirement that the offender be cured or society be made secure from him. Only one other element was emphasized besides, that the penalty was a means of deterring from crime. The explanations that were put forward in the beginning of the nineteenth century were cited, according to which two factors appeared in deterrence: first, the threat of punishment, which was intended to act as a counter motive to the incentives to crime; and then, if the threat alone proved insufficient, the visitation of punishment. This latter factor, however, occupies a very secondary place; if it were possible for the first to be effective by

[18] Compare also *Alexander von Hales*, "Summa," II, fol. 106: "Liberum arbitrium est consensus ob voluntatis inamissibilem libertatem et rationis indeclinabile judicium."

itself, the infliction of the punishment would be quite unnecessary. Punishment would only be imposed because without it the threat would be void and ineffective, a mere phantom that would at once be recognized as an empty shadow. According to this view, penal execution would be only an indirect necessity; and if it were possible, let us say, to deceive the world, and to pretend that the punishment was being carried out, while in reality the criminals in prison were being entertained by games and dancing, the penal execution would then be quite unnecessary. If this in itself is an exceedingly hollow and unreal view, the whole theory becomes still more unendurable, because it implies that one must suffer for the sake of another. The offender, unfortunate victim of natural instincts that are not sufficiently tamed by the threat of punishment, would thus have to suffer in order that the threat of punishment might still retain its force for others: he would be the *souffre-douleur* of society.

With ideas of this sort it was believed possible to advance criminal law. On the one side was Feuerbach's threat of punishment; on the other, penal punishment of the *souffre-douleur* of society, and finally the great insane asylum in which criminals would be kept for the protection of society: for according to this view, there would be no difference between the insane and criminals; that is, no difference that would justify other treatment on principle, except that with the insane the threat of punishment would be perhaps less effective than with the sane — and even that is not always the case.

3. One might feel tempted here to write a satire. Such a criminal law is impossible, or rather it is no longer criminal law at all. Instead of developing criminal law, it was to dissolve it entirely. Instead of justice, we were offered a mere empty semblance.

4. It would, indeed, be unjust to deny all merit to this tendency. It did in truth emphasize things which otherwise perhaps would not have been so clearly seen. It is true that social conditions are largely responsible for crime; partly, in that a man may be deprived of the means of subsistence; partly, because he may be forced into an environment in which his activity cannot properly develop, or in that he may be surrounded by an impure and depraved atmosphere, and be brought into contact with views of life that undermine his morality. No one will deny this, and it is therefore one of our chief duties to improve social conditions. This may be done partly by public measures, partly by private activities. Societies and charitable associations can do much to relieve the evil, and to foster conditions which allow of a tolerable development of moral and economic powers. It is equally certain that much can be accomplished by proper training and education of the young; and that it is a wrong system to maintain as inviolable the principle of home training, even where children grow up in a corrupt atmosphere which, like a plague, destroys all the germs of morality. We all know this, and it requires no new school of criminal law to bring it before our eyes. (Compare above, p. 108 (b).)

It is equally true that punishment by no means ends the matter; that a man must often be subjected to compulsory training afterwards, in order to become a fit member of human society; moreover, that after he has been punished we have no right simply to turn him loose in the world, but that he must be aided to return to sound associations. It is comprehensible that in many cases we should regard compulsory or corrective education as necessary after the criminal has paid the penalty, and thus become free from his deed: the fact

that he has been punished by no means makes him a useful member of society.

It is none the less true, that, even after the penalty has been carried out, it is still often necessary to protect society from the offender; for, not every man who has served his sentence ceases to be a dangerous fellow; not all are so completely cured of their passions and evil impulses, that it is safe to set them free in the world. But even our fathers knew that. Schwarzenberg, in his day, and the "Carolina" recognized permanent imprisonment in cases where no guaranty could be given for a dangerous man; and, moreover, it was customary to send such persons across the frontier, and not only across it, but to banish them to distant lands. In Alsace the offender was banished across the Longobard mountains, in Bamberg across the Alps, and another means that was considered so effective in that cruel age, that the Bishop of Bamberg made it a special law, was blinding. When a man has lost his sight, he is so helpless that he can no longer be considered dangerous.

Today, of course, we no longer banish and blind, but we must take other measures to render the criminal innocuous; for instance, by deportation, or confinement in special institutions.

5. It is the task of the present to cease mixing penalty, correction, and protection in one concoction, as has hitherto been done, and regarding it as one and the same efficacious dose.[19] In this way, of course, the idea of punishment was bound to evaporate. It is indeed possible, if a man is punished by loss of liberty, to use this loss of liberty for correction and compulsory education; but it is a mere chance, if the time of punishment coincides with the time of education, and as regards the thought of security, generally only the

[19] Compare "Moderne Rechtsprobleme," p. 44 f., 51 f.

punishment of imprisonment for life will absolutely protect society. But it is unjust to compel a man who only deserves temporary loss of liberty to spend his whole life in a penal institution; whereas, it may be perfectly suitable, after he has paid his penalty, to keep him in an institution of security (*Sicherungsanstalt*), the purpose of which is solely security so that no more discomfort than is absolutely necessary in order to afford protection to society need be inflicted. This security may of course be obtained in other ways; for instance, by forbidding the man to visit public houses, as is done in some of the Swiss cantons, etc.

When we have once thus clearly separated punishment from other elements, the idea of punishment will then appear in its true light; and we will be able to devote ourselves so much the more to serving the ends of justice.

The progress of criminal law will then be as follows:

1. To distinguish and separate sharply righteous punishment from all the other consequences of the evil deed.

2. To take equal care that the misdeed is expiated by the proper punishment, and that with this atonement, other corrective measures are employed.

(*cc*) The Need of Punishment.

Punishment must conform to humanity's need of punishment. This need is not an absolute one. This is one of the most fruitful thoughts that connects the theory of retribution with modern feeling and makes it capable of satisfying all the demands of our present-day life. Above all, this idea is important in explaining and justifying pardon; for, the need of punishment not being absolute, there is good reason why, whenever important cultural conditions so indicate, punishment should be omitted. The consideration of prescription

is also in accordance with this thought; for it is time, above all things, that decreases the need of punishment more and more. And equally in accordance with it is the important modern institution of conditional sentence, for here the object is to set on his feet a person who has once fallen; and, after the difficult moments of the judicial proceedings, to offer him a helping hand, so that he may improve, and remain in the circle of those who are active in a positive way. For this reason, he must remain unpunished for the present; not even being subject to a criminal judgment, but rather the deed must be simply covered up and forgotten. Hence, it is best for the conditional sentence to be so framed that it is actually carried out only if the condition that it is desired to avoid really occurs; that is to say, if the offender behaves badly, and thus shows that there is need of punishment as regards the established fact.

(*dd*) Details of Criminal Law.

1. The difference between completed acts and attempts also comes more or less into prominence, according to whether the subjective or the objective phase of the act is more pronounced. In regarding the question subjectively, so that it is only the inner guilt that is expiated, the difference between attempt and completion is only a difference of chance, based solely on whether the evil intention that is projected into the external world encounters favorable or unfavorable circumstances. There is no longer any difference made between completion and attempt. The fortunate chance that prevented the completion of the act, and turned it into an attempt, cannot be credited to the perpetrator.

It is quite otherwise, if not only the guilty intention, but also the destructive intention, is considered. The unsuccessful act is without disadvantage to mankind,

and destroys no appreciable value. It is, indeed, not without significance in its moral results, but no illegal injury occurs. Hence, the need of punishment is slighter; for punishment conforms not only to the seriousness of the guilt, but also to the evil that the deed brings about when it strikes into the world of values: the graver the consequences are, the more serious is its opposition to society, and the more necessary is punishment.

It follows, as a matter of course, that the intermediate step between purely subjective and purely objective treatment best covers the determinative factors, conforms best to the demands of justice, and therefore stands on a higher plane than the treatment that does not punish the attempt at all or punishes it equally with the completed act.[20]

2. (*a*) Several persons may participate in the act, either by actual co-operation, or by mere psychic influence. In actual co-operation, however, psychic elements also come under consideration; for we have only to do with true co-operation if several persons strive toward the same end. This working together may be mutual, each one knowing what the other is doing and striving to connect his action with the others. It may possibly, however, be one-sided; for instance, *A* knows what *B* is doing, but *B* knows nothing of *A*'s action. In such a case, of course, *B* can only be held accountable for what he himself did; whereas *A* is also connected with the success of *B*'s action, because he made it a means of carrying out his own plan, and thus used it in

[20] Thus even the Scholastics, for instance *Alexander von Hales* ("Summa de intentione in genere," (1515) II, fol. 217), wrote: "Qui voluntatem plenam exeuntem in opus habuit, recipiet similiter ratione voluntatis et ratione actus: qui vero habuit tantum voluntatem, non recipiet nisi pro voluntate, non enim recipiet pro eo quod non habuit; ergo hi duo ad paria in merito judicantur." And the exponent of natural law, *Hugo Grotius*, "De jure belli et pacis," II, 20, sec. 39; *Pufendorf*, "De off. hom." II, 13, sec. 16; *Montesquieu*, "Esprit," VI, 16: "plutôt . . . ce qui attaque plus la société que ce qui la choque moins."

the same way as he would have used some natural operation to further his own ends.

(*b*) The activity of the instigator, and that of his psychic assistant, come under consideration in a purely psychological way. The instigator is the one who by arousing the motive causes the action; as, by means of incentives, he stimulates some person to some act in which otherwise this person would not engage. It has been asserted that no causation is possible here, because the activity of the instigator is directed towards a free human soul that cannot be regarded as subject to direction; not, at least, if we assume free will. This view has long been refuted. Under any conditions, the instigator can arouse the motives, and thus bring about an inclination to activity, which leads to the deed, if the offender gives way to it. His offense lies in that he does not resist but acts in accordance with this inclination. But this does not prevent the man who caused the inclination from being responsible, in the same way as he would be responsible if he laid something on an inclined plane, where it would fall unless some obstacle intervened.

(*c*) As regards the liability of the instigator, various ways have been taken. Some laws provide that the instigator shall be more severely punished than the perpetrator, because the initiative must be attributed to him; yet, it must be borne in mind that the seed sown by the instigator often falls on fertile soil, and the offender not seldom goes to work with a light heart, as soon as he has received even a slight impetus; in fact, it is often the perpetrator of the deed who offers himself, and awaits the instigator's suggestion. Hence, the latest codes of law rightly and on principle place the instigator and the actual offender on an equal basis; which, of course, does not prevent, that in individual cases, their punishment may vary greatly.

3. It is a nation's cultural position and cultural needs that determine what is to be punished. What is trifling and unimportant to one nation is grave and significant to another. The following points in particular come under consideration:

(*a*) A nation that is strongly attached to property will punish offenses against property, especially theft, severely; while another nation, with a weaker proprietary sense, will punish the same crime more mildly, perhaps only by a fine. That German law originally simply hanged the thief and had done with it, shows the strength of the acquisitive instinct of the Germans.

(*b*) A nation that especially loathes certain accompanying phenomena of the deed, punishes the latter much more severely when these phenomena are present than otherwise. Thus, for instance, German law provides a heavier penalty for deceitful than for violent offenses.

(*c*) Legislators sometimes try to bring about an improvement in conditions by imposing particularly heavy penalties for certain crimes. These attempts can only be successful if they are supported by the sentiment of the nation.

4. The relation between punishment and guilt also is not absolute, but is determined by the individual's mode of feeling, and the social perception that weighs the guilt and the atonement that corresponds to it.

The erroneous assumption that capital punishment is unjust in all cases has long since disappeared. For the rest, the kind of punishment (imprisonment, deportation) is a matter for criminology to deal with, and need not be further discussed here.

2. *Realization of Criminal Law. Criminal Procedure*

1. Criminal procedure long retains the same form as civil procedure; the more so because later criminal law took the place of kin-revenge, and kin-revenge of course emanated from the law of the injured individual. It is true that as soon as the idea of injured human society appeared, a procedure could not suffice in which only the injured individual appeared; for the need of punishment was frequently keen, even while there might not be any relative of the murdered man, or none, at least, that would appear. Thus, gradually, the principle developed, that in such cases, where the whole of society appeared to be more or less affected, any one of the people was entitled to prosecute. The prosecution became a popular prosecution, a system that besides certain advantages, involved also serious disadvantages; especially, as not always the proper persons appeared as accusers. It is therefore comprehensible that a second procedure developed which, in contrast to the more democratic principle of the popular prosecution, may be regarded as monarchical — the inquisitorial procedure. The idea from which this started was that rumor, public report, must be treated as taking the place of an accuser, so that in such a case no accuser was necessary. The underlying reason was, however, that the chief considered himself to be the representative of the public interest, and declared himself to be competent to act wherever he supposed State interests to be injured. When a procedure without a complainant was thus constructed, the party-process (*Partei-Prozess*) had to be given up altogether, and legal procedure so transformed that the State, that is, the judge, on his own motion advanced everything that he considered necessary in order to reach correct conclusions.

2. Thus it is comprehensible that the inquisitorial process (*Untersuchungsprozess*) may be good or bad in form; it may also degenerate. This happened in the Germanic Middle Ages under the influence of the system of torture (p. 255), and of the idea that the examining judge might use every possible method, as far as the accused was concerned, to obtain the truth. The accused was denied all the rights of a person and was treated as a thing without rights, to be used for State purposes in any way that might be desired. The theory of the rights of man was not yet invented; and the legal sense was not sufficiently developed to make it possible to realize how greatly all the members of the State were injured by such methods, and to what extent personal dignity was undermined. The abolition of this system, and the transformation of the inquisitorial process, were missions to be performed by more modern times; just as were the abolition of torture, and the establishment of the principle that no one can be obliged to incriminate himself and testify against himself.

3. In contrast to this, the State had to get to the bottom of the matter, and obtain the necessary proofs by thorough investigation of crimes. A perfecting of the methods of examination and investigation necessarily went hand in hand with the idea that the person was inviolable to the extent that he could not be required to testify against himself. Accordingly, criminology and criminological technic, parallel with criminal procedure, developed to ever greater perfection. (p. 263.) This is the point at which we now stand. There may be added the inclusion of the lay element, which rests on the general fundamental idea explained in the theory of the State. (p. 210.)

SECTION XXVIII

III. PEACEABLE PROCEDURE

1. The activity of the State in furthering the development of the rights of individuals may be denominated peaceable procedure (*Friedensgang*). Here we are not concerned with the settlement of conflicts, but with peaceful activity in the adjustment of legal transactions, and the carrying out of legal actions.

2. The State offers its aid:

(*a*) For the sake of the certainty of proof.

(*b*) To enlighten those concerned in their legal dealings.

(*c*) To examine within a certain compass, whether the legal transaction bears in itself the presuppositions of legal efficacy.

(*d*) To bring about publicity which is sometimes more positive in nature; sometimes represents a double legal order (*e.g.*, inheritance certificate); sometimes becomes a condition of rights (*e.g.*, land registry). Comp. p. 87 (3).

(*e*) To establish organs or representatives for those persons who, according to definite legal principles, must act through organs or representatives; for instance, guardians, organs of a juristic person.

3. Peaceable procedure is also called non-contentious jurisdiction (*freiwillige Gerichtsbarkeit*). There is a non-contentious jurisdiction of civil and of public law (for instance, the issuance of patents). The former is generally considered exclusive, but incorrectly.

4. Peaceable procedure was not developed in entirety, but in individual cases of application, and has only recently been embodied in a system.

5. The details belong to the subject of legal technic. (Compare "Einführung," 3 edition, p. 202.)

CHAPTER IX

THE LAW OF HUMAN SOCIETY—THE LAW OF NATIONS

SECTION XXIX

I. INTERNATIONAL LAW AND LAW OF FEDERATED STATES

1. The State as the realization of the moral idea has sovereignty, that is, an authority that stands above individuals, limited solely by the direction of the State's aim and the mission of culture. But the question whether such a restriction is fitting in the individual case is left to the State alone; and its organs have only to consider how far legislation must reach in order to meet the demands of culture.

This standpoint, according to which the State forms the highest instance, is the result of historical evolution; it dates from the time when the idea of the world empire had disappeared, and all the States confronted one another independently, and without supreme authority.

2. The division of mankind into States was indispensable; it had this great advantage, that the members of the different States could develop their qualities and talents without being hindered by the contradictory views and endeavors of others who were dominated by an entirely different view of life. Such a national formation is of special value, because it is the only way in which a uniformly gifted national group can develop its own life, its own talents, and abilities to the utmost. (p. 43.)

On the other hand, every class of the population has its own one-sidedness; it will remain stationary on a certain plane of education and knowledge unless it receives impulses from without, and feels the influence of foreign images and ideas; so that a constant exchange between its own development and between the assimilation of, and adaptation to, external ideas takes place.

In this way, nations of the first rank have developed in quite small State communities; but in such a manner that constant reciprocal action went on; the most striking example of this is the Greeks of antiquity.

It is clear, however, that certain great aims can only be accomplished in a more extended national community, particularly, great agricultural aims; but industrial, educational, and philanthropic aims also demand that an extensive field shall be open for endeavors, and abundant means shall be at hand in order to overcome the difficulties.

3. In this way State confronts State, each for itself, but each dependent on the other for certain cultural purposes. This constellation led originally to a kind of anarchy; for among the States, in conformity with the principle of sovereignty, no law is known; the source of the law is the State and the State only; it can construct a system of law as it will.

This condition is unendurable for long and cannot exist alongside of the great cultural mission of humanity. Even antiquity, even the Orient assumed that there was a higher law than State law — universal divine law. The States by worshipping their gods regarded them as the representatives of the law, and the protectors of concluded agreements; and just as the divine law was appealed to in order to confirm private agreements, so too it was used to confirm agreements between the nations. This was especially so because it was assumed

that the divine laws of the various religions had certain points in common; and, particularly, that in the whole world of men the principle was valid that the faithful fulfillment of an agreement was a duty over which heaven ruled.

But also in other respects people believed themselves restricted by divine law; as, for instance, in the manner of declaring war, and other things.

In this way, it is natural that we should find, even in antiquity, legal tenets of a law that stood above the nations. Thus in old Babylonia, in the Egyptian age, and in eastern Asia (above all, in China), we find a variety of agreements, partly treaties of peace, partly treaties of justice (*Justizverträge*); and among the Romans, too, the law of agreement would have been more developed if the imperial character of the Roman Empire had not caused the whole conception of international law to totter.

The Roman conception of the world empire continued up through the Middle Ages, till to the destruction of the imperial idea; and, at this point, international law had again to begin. It was the necessary supplement of legal history as soon as the dreams of a world empire vanished. There was now no longer an emperor, as an emperor of the world, at the head, to whom the individual States were subject, who judged them and settled their differences. Hence the idea was bound to arise that, though no world State stood above the nations and although the religious law, owing to the differences in religious conviction, could no longer uniformly bind the world, yet a super-national lawruled that regulated the relations of the nations to one another; they, neither, could live in anarchy but must conduct themselves towards one another according to definite legal principles.

4. The idea of a super-national law standing above the sovereignty of the State was bound to appeal to the nations, the more because two formations arose which forced this idea upon them. On the one hand, there was the federation of States: agreements among States had assumed such proportions in some instances that the States really formed an association and took a variety of enterprises into their common keeping. This connection was increased by the institution called "real union," where two States placed themselves under one and the same monarch.

The matter necessarily appeared still more urgent when the idea of the federal State arose; that is, of a State community formed by a number of States that join one another to form a unified State, so that the members of the individual States are at the same time members of the whole State. It is true that this makes it necessary for the individual States to give up something of their sovereignty, and limit themselves in their State authority in favor of the unified State. The federal State is calculated, on the one side, to give strength and solidity to the whole and to make it possible for great enterprises to be undertaken, for commerce with foreign countries to be properly protected, and for the individual to occupy a position of respect abroad. On the other side, it affords the individual State the possibility of cultivating the special relations that are suited to the character of its population, and to develop its own life within its own borders. The combination between unified strength and the preservation of the peculiarity of the different circles of the population which is indeed possible in the single detached State but is frequently in danger there, becomes a reality in the federal State. The federal State also makes it possible for States that would on no account lose their

identity, by forming a part of a unified State, to join together and form a federation to which they concede only a portion of their rights: thus the federal State is extremely productive of unity, and hence also promotive of culture.[1]

Even in antiquity we find examples of federal States; but the idea became fruitful mainly through the example of the United States of America, whose constitution served as a model for most of the later federal States. The United States is a conspicuous example of the fruitful power of this idea; it may be that some time in the future the States of Europe will also join one another in this way and form a unity. If this were done, something would be realized that has been merely a dream and an illusion since the fall of the imperial idea in Europe.

The federal State endeavors then so to unite the States that the citizens of the individual States are also citizens of the whole, and yet belong to their ownStates. This is the more significant because the federal State offers a number of possibilities for development both in the direction of individualization and of unification; for the capabilities of the federal State may be very different from those of the individual States. Thus, the development is possible that the number of such capabilities increases and the collectivity inclines more and more towards centralization. But, on the other hand, it may also be that the tendency toward things in common may decrease and that distinctions may increase.

5. In a certain sense, the federal State is a dissolution of international into national law, for the relation between the whole State and the individual State is not one of international but of national law; because

[1] "Moderne Rechtsprobleme," p. 85 f.

the separate States have no sovereignty, but are subject to the whole State, just as are the citizens of the States; only the relation of the separate States to one another may be one of international law if the whole State has not taken these relations into its keeping and declared that they are to be regulated by the whole State. Nevertheless, the federal States suggest international law to this extent, that here too a super-national law exists; for the individual States are States and are subject to the law of the whole State. But this super-State law again is itself a State system; it is the law of the whole State, not a system of law beyond the State, rooted in a legal order that lies outside.

SECTION XXX

II. SUPER-NATIONAL LAW (*Überstaatliches Recht*)

1. It would be the ideal of cultural development if all States would unite in one great whole and aid one another in the creation of culture; so that a fraternalism would rule among the nations, and each would advance the other, in order to attain to the highest technical, scientific, and artistic achievement. This would presuppose a kind of world empire, a great family, the members of which would be the different nations; a family with common organization, and unified leadership.

This has sometimes been tried; frequently nations and rulers have undertaken to create a world empire. The most important attempt was the great Christian empire in the Middle Ages with the German Empire; it had been preceded by the mighty Roman world system. (Compare p. 296.)

These dreams have flown. An analogy to Roman world law no longer exists, and the union of the nations in one great Christian world-State has long ceased. Rather, as we have already said, independent States developed from the ruins of the old imperialism, with complete sovereignty; and the nations therefore confront one another as individuals, each with its independent laws, each, as a State, creating a system of law.

2. After the separation of the nations, international law, as the super-national standard, necessarily combined the nations and created legal relations among them. Such relations among the nations may be more or less intimate, or they may be limited simply to the regulation of certain points in international commerce. But as soon as disputes arise, their settlement entails considerable difficulty. The idea of establishing an areopagus of the nations, or at least a court of arbitration to settle these disagreements, bears witness to a closer international legal connection. This idea has recently greatly increased in strength, and the desire for peaceful settlement has become more and more urgent.

3. Of course, such international legal customs always mean an interference with the power of the individual State; hence we have to struggle against very strong counter-currents of individualistic national nature. The passionate devotion to one's own nationality described on page 294, a quality that in itself is promotive of culture, will long fight against bowing to such a super-national law. Nevertheless, the idea must gradually penetrate, and when it has become fully developed, the chief step toward the peace of the nations has been taken: peace represents fraternalism among the nations, negative fraternalism at least, so that there is no longer

any active hatred. Positive fraternalism may develop along with it, but that will require that the nations approach nearer to one another.

4. Another important point must be noticed here. It is not always legal difficulties that lead to strife, but often cultural historical disagreements which prevent a nation from occupying the position that belongs to it according to its talents and its place in the ranks of the nations. Not seldom races are split up under different governments; while their union might mean an advance in culture, since the combination of similar forces is often able to produce new advances. Oftentimes a nation is shut off from the sea, the means of communication with other nations, and believes that it is in need of this, in order to develop itself economically, and to take its proper place among the peoples. Sometimes the industries of a nation are injured by the oppressive measures of another nation which refuses to grant better conditions.

In these cases, the forces contained in collective life will strive for an outlet; and if they are strong enough the nation will attempt, if necessary with violence, to gain the object that it believes to be a necessary condition of its welfare.

That such developments and alterations take place is a national necessity. The active forces of humanity cannot be permanently repressed. New tendencies and ambitions will ferment in the old channels, and will not rest until they have found their fulfillment in one way or another; unless, indeed, overpowering forces oppose them, which then leads to severe oppression. In any case, it will come to a contest of forces in order to prove whether the abilities contained in the nation are adequate to overcome the obstacles. As has been elsewhere emphasized,[2] this is the most important obstacle to

[2] "Moderne Rechtsprobleme," p. 104.

universal world peace, and the last stronghold of war can never be destroyed until a method is found of settling such differences in a suitable way. We have still far to go to reach this point, and our concern at present cannot be to abolish wars but to restrict and limit them to a great extent.[8]

5. When once the idea has arisen in this way that there is some law above the State, a so-called super-national law, we have gained a new plane of culture. The attempts to form a world State endured only for a time because it was not possible, in view of the size of the earth and the tremendous differences in mankind, to establish a unified State government with power enough to operate from one end of the State to the other and yet give every race the possibility of developing independently. Even the boldest glance into the future in this direction can see at the most only State alliances, or federations of States, under the protection of which the individual States would stand and the super-national law would find its support. How far in this direction the future formation of States will go cannot be foreseen; but in any case it is in a far distant future. In the meantime, it is a great idea that the relations of the States to one another should be subject to a legal order and that here, too, not the voice of power but the voice of culture should be determinative. It is not only the individual State that should be a centre of culture, but the attitude of all the States to one another should conform to the cultural order so that one does not oppose and operate against the cultural development of another. This is especially true because our commerce aims at overstepping the State boundaries and trade spreads over the whole world without keeping

[8] In regard to notable peace efforts that date back to *Du Bois* and the Polish king *Podebrad* (1462), compare *Schücking*, "Organisation der Welt," p. 560, 564.

to the limits of the State. The exchange of wares, travel abroad, the constant interchange of ideas and everything that intercourse includes, makes the habits of one country known in another where they may be adopted and become part of the national customs.

6. But the question is very important whether super-national law created in this way, in as far as it is a law among the nations, also creates indirect rights of individuals; for instance, if in an international legal agreement it is provided that certain religious societies shall have juristic personalities, or that navigation shall be free. Here there are two possibilities: either international law only obliges the individual State to conform to the agreement, while the individuals of that State still remain subject only to its own legislation; in which case it is indeed the duty of the State to adjust its legislation in conformity with this; but if it does not, the individual has no means of forcing the fulfillment of the international legal duty. Thus, it would be, for instance, if the State, in spite of the agreement, should through its legislation deprive the religious society of its juristic personality. The tendency of modern law is to determine that such a super-national order also grants rights to the individuals which are independent of the legislation of individual States. The development, however, is not yet complete, and especially the principle has not yet been acknowledged that the courts are able to declare a law invalid because it conflicts with international law. No State should cherish the idea that it is completely isolated, but each should realize that it forms a part of the great community of States in and with which alone it can operate.[4]

7. Super-national law without the support of a super-State (*Uberstaat*) cannot of course be true legislation

[4] See my essay in the "Z. f. Völkerrecht," II, p. 209.

(*Gesetzesrecht*); but it can be law that develops in legal custom; it can be customary law. (p. 86.) It may also arise in this way, that the States come together and declare certain principles to be valid principles. In this way, too, the idea of law is embodied, and made the universal authority; just as in an individual State men may establish customary law, thus raising it out of the condition of doubt onto a firm basis.

SECTION XXXI

III. ACHIEVEMENTS AND ASPIRATIONS

1. At present international law has not prospered to the extent of making the principle of self-help entirely dispensable; and with self-help comes power, and also the abuse of power. A condition in which the law of self-help is paramount is war, whereby two States enter into an antagonistic relation and undertake, by methods admissible under international law, to weaken each other with the object of attaining certain demands, and forcing the other to yield. War was formerly a relation outside the law. Although otherwise international law was but little developed, yet in peace certain principles existed; but in war everything was thought admissible, and people believed themselves superior to all law. We have ceased to hold this view. In war we do indeed tolerate an institution of self-help, but one that lies within international law, and that can be applied only under the observance of its principles. These principles have become more and more settled, and we speak of humane war, meaning that only those sufferings may be inflicted which serve the purposes of

war; no unnecessary tortures: war must be a war of purpose, not a war of passion.

The controlling idea is that war is waged only against the State, not against the population; against the State and the organs of the State to which organs also the combatants belong; further, that the activity of war, in as far as it keeps within the limits of international law, is legal, and therefore neither the State nor the combatants can be made responsible for it. Therefore no harm may be done to the prisoners of war, and they may only be guarded as closely as is necessary in order to keep them away from the enemy and thus to deprive him of human material.

It was long before such principles were accepted; for they are based on conceptual differences with which the nations originally were not familiar; and they were also at variance with the passionateness that existed between the nations, and which immediately extended enmity against the State to include also the people. It is a long step from the former system of waging war, under which whole classes of the inhabitants were made slaves and where robbery and plundering were practised, to the manner in which wars are carried on today. The modern principle is a tremendous advance, resting on the principle that even in war, the results of culture must be spared as far as possible; and that the personal happiness of the people must not be injured to a greater extent than the purposes of war require.

But the time will come when wars grow ever rarer or cease altogether. Before this can happen, however, super-national law must be developed in such a way that the sovereignty of the individual States obeys unconditionally the authority of the higher law, and that organs exist for this purpose which pronounce the higher law and are in the position to carry it out.

A fuller treatment of the subject belongs to international law.[5] We have merely spoken here of a future when a super-national law will stand above national law, when the State will still be a great cultural institution, but the whole of humanity and the nations will no longer work alone, but in their collectivity, to bring about the supreme aims of culture.

2. In international law, to a greater extent than elsewhere, the great principle exists that whatever is, is reasonable. This does not mean that whatever is, is perfect, and needs no alteration, but that what exists in the life of States and nations, daily fulfills an abundance of cultural purposes. Hence whatever exists, even though it be imperfect, must be recognized as a reasonable institution; for if it did not exist, the situation might become unendurable, since in an unorganized condition of things, all the achievements of culture would perish.

No special justification is needed therefore, if, through the violence of war, or in some other way, a definite change is wrought in the international legal situation; this change is valid, at least as long as no higher super-national law interposes and condemns and forbids it; for as long as this is not the case, and the powerful means necessary to enforce super-national law are lacking, it is an unconditional necessity to acknowledge the achievements of international strife. If this were not done there would be no hold, no order, or rule: what exists could never be replaced with something else that would fulfill the demands of culture, and thus we should be plunged into the miserable conditions of anarchy and statelessness.

Hence, the principle must be maintained that as long as super-national law does not advance beyond

[5] "Einführung in die Rechtswissenschaft," p. 285 f.

national law, in this respect, also, the achievements of war become law, and must be recognized as such.

3. Agreements between States have a double significance.

(*a*) They create rights, either of the parties to the agreement only, or also of individual persons, so that the latter can refer directly to the treaty in demanding their rights. (p. 303.)

(*b*) In addition they have this significance, that they establish international legal principles; thus they contribute to the growth of the law as an international customary law.

In both respects, the philosophy of law must recognize agreements between States; for nations, like individuals, are justified in interposing and regulating their legal relations. The conditions of culture can be best fulfilled, and cultural obstacles removed, through the possibility of such regulation in accordance with agreement.

It is indeed true that in cases of urgent necessity, a State may withdraw from an agreement, if it would otherwise be obliged to sacrifice its vital interests; such a reservation should be inserted in all international agreements; for no nation is justified in renouncing its conditions of life.

4. Thus it appears that the international law of today is in a state of insufficiency; but it is the sphere in which we must work for development with the keenest pleasure in creation; for the future cannot arise unless it is prepared by the power of the present. What the present prepares with no prospect of immediate realization is not work done in vain; for it lays the foundations of future ages: the butterfly can only evolve from the caterpillar and the coccoon.

First Appendix

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FIRST APPENDIX

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Second Appendix

KOHLER'S PHILOSOPHY OF LAW

SECOND APPENDIX

KOHLER'S PHILOSOPHY OF LAW[1]

By Adolf Lasson[2]

Efforts toward a philosophical understanding of the phenomena of law have not been very active in the last two decades, at least not in Germany. The philosophers who first of all were fitted for such labor have had other things to do. They have been occupied with theories of the validity of knowledge and empirical psychology, and have been trying to find out what Kant really meant to say. Any philosophizing about the nature and conception of law, its significance in connection with the universe, and its relation to other forms of the *ethos* must have appeared very trivial as compared with such immense, fundamental problems. Hardly any change in this attitude has come about, even to this day, among professional philosophers. The belief has arisen, however, in some quarters, that the current method of epistemological and psychological investigation has about as much utility as the effort to milk a he-goat into a sieve.

Yet, the search for the real and conclusive Kant interpretation is a perpetual allurement for certain select spirits; and this enchantment probably will hold for them its fascination for a long time to come. When a substantial problem is encountered, such as the

[1] A review published in "Archiv für Rechts- und Wirtschaftsphilosophie," (March, 1909, Bd. II, Heft 3, pp. 318–326), translated by *Albert Kocourek*, Lecturer in Jurisprudence at Northwestern University, and editor of this volume.

[2] Professor at the University of Berlin.

difference between the natural and the mental sciences, these investigators hold their breath, with their faculties trained on some formula dealing with the means and method of knowledge, but do not regard the real meaning of the object of knowledge. Such an inquiry, fearful to contemplate, would be a plunge into metaphysics!

This temerity is only characteristic of the age. We prefer to understand religion by means of a psychology of religion, and art through a psychology of art. Everything is resolved into a classification of the feelings. Notwithstanding this, it is yet true that there are those who have never classified their mental processes, and have still retained their respectability. There are, likewise, others who have never regarded their feelings and have considered them as unimportant for things in themselves, and have passed over the accidents of individuality to the end that all value and effort have been assigned to the function of thought and the objects embraced by thought. Advancement of science is, perhaps, to be sooner expected to come from persons who proceed in this way. This may be true of all departments of knowledge, and even of Philosophy of Law. We shall not make this a matter of controversy here. Everyone may arrive at his own judgment as to these things without too much difficulty.

In any case, Philosophy of Law, from the standpoint of psychology, constructed on biological grounds (from the operation of impulses and desires, and feelings of pleasure and displeasure, and derived from the nature of things and the application to them of the reasoning faculties) is an obsolete and disaffirmed pursuit.

Instead of Philosophy of Law, sociology is now the subject that engages attention. The fairness of the name is thoroughly appropriate to designate the inquiry

to which it is attached. It will not be necessary to say anything of the wonderful volume of learning produced by sociological studies. The thing speaks for itself. One has only to think of the deluge of books, pamphlets and essays which appear year after year on these subjects; although these efforts have more to do with formulas, methods, and conclusions than with substantive matters. However, it is utterly indifferent if the importance of these sociological investigations is rated more or less. Philosophy of Law can neither be set aside or strengthened by the fact; and, least of all, for those who are not able to discover in the supposed contributions of sociological thought anything more or less than certain voluntary generalizations of the isolated and accidental events of soul-life, such as are found in the external world.

Whoever looks upon the crumpled metaphysic which the sociological method of speculation seeks to construct, as a stupid and fantastic mythology, will long to escape from this mephitic atmosphere to the free air of clear thought. He will prefer to hear not of animal impulses and desires, but of ideas of human reason and their logical consequences.

Inasmuch as, in Germany, at least, philosophers are otherwise occupied, it is fortunate that the jurist has entered where the philosopher has retired. Within the last decade there has been presented to us, and we have gratefully acknowledged, the great, comprehensive work of Berolzheimer, *Rechts- und Wirtschafts-philosophie*. The book of Josef Kohler is the product of the same spirit, and is the companion in purpose of Berolzheimer's labor. It is entitled a treatise. While Berolzheimer aims at exhaustive elaboration of his subject, and seeks to cover the whole field, Kohler holds himself to brief outlines. He brings out the most

essential matters, and the decisive points of view, but only grazes the surface of the luxurious fullness of his subject. The reader, by this method, is given a preliminary preparation for the consideration of this study. He must be able to encompass, as a unity, the widely ramified matters involved in a great and extensive co-ordination of ideas. The internal value and the high importance of fundamental legal institutions and legal principles must be drawn in a number of prominent and distinct lines, in order to make a sharp impression on the mind of the learner. This survey is also of importance for legal science itself, to the extent that every juristic construction most securely admits in individual cases, of the connection of its development with philosophical foundations. This is the purpose of this book; and, in this sense, it will fulfill its purpose, and enrich the literature of this subject.

With this volume, Kohler does not enter the domain of Philosophy of Law for the first time. Apart from the great number of his large and small works in science of law, in which, at all points, he maintains the philosophical spirit, he has written a short sketch of Philosophy of Law as an introduction to his new form of Juristic Survey, which contains many interesting ideas, and also much that is too adventurous.

In his *Introduction to the Science of Law* (*Einführung in die Rechtswissenschaft*) which appeared first in 1902, and is now in the third edition,[8] he set for himself the task "of presenting from a high outlook-tower a view of the whole science of law"—an undertaking which could only be carried out with the aid of philosophy. Whilst, in that work, he intends to present "a preliminary, general view, and a philosophic survey of the science of law to beginners of this study," yet, he addresses

[8] [At this later date in the fourth edition. — *Editor.*]

himself to the whole thinking public, in the fixed conviction that "an insight into the law, and the governing forces of the legal system, is as important for persons of culture as knowledge of the forces of nature which surround us on every hand." The result shows that he has rendered a service of great value. In that "it has always been his effort in all special studies never to leave out of consideration the unity of these studies, or the internal relations of the whole," necessarily it must have been essential for him to carry out and express, in systematic form, the internal relations which he perceived and apprehended in them.

This treatise on Philosophy of Law is to a certain extent the desired completion, and indeed the crowning effort, of the immense activities of the author. The great audience which has learned to value the numerous works of the author in their highly diversified fields of effort will gratefully acknowledge this treatise as opening up a new viewpoint on Kohler's labors, and as disclosing the impelling motive of his scientific activities. It will, at the same time, stimulate a more fundamental insight into what he had already accomplished.

Kohler's position cannot be understood from an external viewpoint. One must sink into his works in order to understand and appreciate them. Kohler as a man, as a thinker, as a scholar, and as a writer is altogether an extraordinary personality. He is first of all and chiefly a jurist, and there is no department of legal science in which he has not been active in a productive sense. Yet, there are branches of the science of law which he has cultivated by preference, and in which he has attained, by unquestioned accomplishment, the widest prominence. While he has achieved fame as a jurist, he has also merited distinction in the most diverse other activities. No matter what he undertakes, he is

always interesting; and the tokens of a fruitful genius are unmistakable in all his efforts. Even those who judge him with the least amiability must admit that he disseminates with a copious hand an inexhaustible fullness of ideas of the greatest value. Thus, Kohler is a phenomenon of the rarest kind; always active, a maker of the greatest activity, a delver into strange things, distinguished as a creator, of untiring industry, and never refusing a cheerful assistance.

The underlying power of his abundance, and this universality of unified effort are grounded on the philosophical nature of the man. Kohler is mentally centered as a jurist, but his inner nature and his boundless external activities radiate out from the juristic center, because he connects all with all as a philosopher. He never holds himself on the periphery of the circle of knowledge, but always exerts himself throughout toward the central point. He places in living relation every particular of every part of his investigations to the highest and most ultimate problems which he attempts, by his own methods, to solve.

Therefore, this jurist is not simply incidentally, but by nature, a legal philosopher. The science of law is the richly equipped impelling cause to bring out his constructive universalism. After all, the law is the fundamental phenomenon of the moral world. It therefore stands at the same time in the midst of the series of the natural order of things. The law, therefore, by virtue of its own nature and importance, is well suited to serve as the starting-point, and as the basis of operation, for the most extensive entrance into the most diversified fields of intellectual activity. Perhaps these reflections may make more comprehensible much of the amazement aroused by Kohler's peculiar genius.

It is unnecessary, for all that, to point out thatKohler

pursues the idealistic turn of thought. The universality of his efforts is grounded on idealism. Idealism is the basis of his drift toward systematic unity. Where the empiricist, the realist, is contented with a mass of particulars which he classifies according to their external, pragmatic relation, there the idealist seeks an internal unity, a principle that is immanent in and penetrates all isolated particulars, and which internally gives them life and form. This is the method that may be emphasized as distinctive of Kohler. The real is thinkable, because, according to its nature, it is thought. Thought lays hold of reality because they are consubstantial, and because the same reason operates in thought as in the real. Thus, Kohler seeks to maintain a close association with the objective, with the absolute idealism of the great thinkers of the classical period of German philosophy.

By preference, he makes use of Hegel. No laudatory word is too full of praise, for Kohler, to distinguish the fame of this forceful man who takes the same rank among German philosophers as Goethe among the German poets. In truth, these two men mutually esteemed and honored each other as like personalities. Kohler, in particular, shows the most ardent admiration for the Hegelian philosophy of law (with allowances for the age which brought it forth) on account of its underlying methods which scrutinized its materials with an inherent reasonableness. Kohler is far removed from Hegelianism in the strict sense. He would be a neo-Hegelian. That which in Hegel is abstruse or too artificial in appearance, he would put aside.

He seeks to invigorate the chilled fancies of Hegel with modern life, and to enrich and more profoundly establish, with a fullness of new facts, his benumbed ideas. Kohler regards the Hegelian dialectic development of ideas as not the strongest, but the weakest side

of his system. He thinks that we may appropriate the essence of Hegel's great ideas without taking over the dry form of his too abstract, methodical process. Hegel, therefore, is his model and master; but, with allowances.

This reference to Hegel does not by any means exhaust Kohler's standpoint. The harp of his system is an instrument of many strings which brings out a harmony of many voices. It is remarkable to what extent he is able to draw together the most heterogeneous things with entire impartiality. The fact that he names Hegel as his model, and in the same breath also Aristotle, is natural and comprehensible, since the affinity between Hegel and the great Stagirite is too conspicuous, and the similarities in their treatment of law and the State are too notorious to be mistaken.

One also will not marvel that a man of such vast learning, a man proficient in the literatures and sciences, in the customs and usages of all peoples in all ages within the reach of history, should find his pleasure in the wisdom of India, in Persian Sufism, in Averroës, and Master Eckhart, and what goes with these things, as well as the materials of a higher inspiration for the discovery of a godliness in mankind. On the contrary, one may appreciate his feelings, even if one places a very high estimate on Kant's historical position, when Kohler bluntly regards, with a kind of repugnance, Kant's open dualism and his sometimes narrow-minded externality of treatment of ethical questions. Truly, it is a childishly naïve thought to expect those who have brought their understanding of ethical things up to Aristotle and Hegel, to give unlimited acquiescence to the elementary Kantian examination of these problems.

The fact that Kohler's system is bottomed on the German idealism of the first half of the past century does not prevent him from being thoroughly modern,

or from employing, in any manner useful, the materials brought to light in the last decades. He pursues the dominion of Idea which as a formative power gives an internal meaning to the impulses and efforts, and the notions and purposes of man's activity, and guides them toward an end. But this tendency of thought leads him all the more to have a regard for the instincts of the human heart, the necessities and desires, the beliefs and habits which impel men to action, as well as the material on which Idea manifests its force.

In this sense, he everywhere resorts to comparative legal history in order to make the internal nature of things more intelligible. He examines exhaustively the connections between law and economic necessities, and does not disdain to lay open the greater and lesser utilities which have contributed in the creation of law, alongside of the internal efficients which arise out of the nature of things, and out of the comprehensive coherence of the whole system of reality. He pursues the conditions of the existence and development of law which spring from social necessities with the same diligence that he traces out the consequences of the internal principle of reason and its logical consequences. That which on logical grounds cannot be derived from an innate co-ordination — the directly imposed, the accidental, the unessential in time and space, the surrounding influences of nature and the forces springing from it, human individuality, racial peculiarities, and the external occurrences and fatalities in nature and human life — all this receives consideration without diminishing the great outward impulsive force of evolution which towers over all these accidental phases of life.

The praise of Kohler is well deserved. He thinks concretely. He does not lose himself in abstractions. He sees one thing without overlooking another. His

constant effort is to grasp things in their unity. Evolution is unquestionably for him the dominating factor. He also has a standard for the valuation of positive law in the idea of justice. He does not neglect to make prominent the fact that ethical principles powerfully manifest themselves in the law. But, the necessity of external order, the requirement of having exact limits of greater or less external meaning as against the internal nature of social relations, and the confused complexity of contending interests of individuals and social communities, all this, in Kohler's treatment of his subject, has its place and shows its influence. He does not neglect to admit even the phenomena of psychology (the boundless and immense multiplicity and lawless contingencies of the internal world), at least not if they submit of approximate measurement as facts having a certain kind of regularity.

He thus attains the position that the law is alterable, and energetically rejects that peculiar notion which assumes a fixed standard of justice in the law (*richtiges Recht*). He sketches (always in broad outline) the history of legal institutions and their unfoldment, from their primitive beginnings. He follows out the cleavage between substantive and adjective law, and brings about an adjustment of this duality of legal aspect by way of interpretation of existing law, or by the creation of a new legal meaning. He clarifies the necessity of equity and justifies institutions like slavery, *Mutterrecht*, and bondage of the wife, by existing historical circumstances, economic conditions, and internal mental states. It is possible for Kohler, in his view of legal institutions, to turn from Hegel where he thinks that Hegel has gone too far in the effort toward an ideal construction of an ideal law and an ideal State. Kohler interposes the elements of the illogical and the inconsistent which have

their undercurrent in historical development. Objectively he is right; but controversially he, perhaps, does not do full justice to the real doctrine of Hegel.

It is in harmony with Kohler's standpoint as to the concrete that he does not rest his position on an external scaffolding erected principally on a systematic foundation, but limits himself to the utmost in his discussion of first principles. We gather from him that the law, as well as all ethical things, is based on the ultimate, ideal destiny of humanity; that the establishment and maintenance of culture and the attainment of a permanent cultural value are the mission of mankind. But, he does not tell us what culture and cultural value are.[4]

He sets this out as understood and assumed. That law and custom, morals, and, finally, ethics (as the last ideality of the internal life) are related, appears throughout his writings; but the differences and similarities of these various forms of ethical determination of the will are, as a rule, not touched upon. The superstructure and the arrangement of this philosophy of law are systematically planned, but the foundations of this construction are not sketched.

There is a general part in Kohler's book which is, as it were, an introduction to philosophy of law, cultural evolution, and the relation between law and culture and legal order and legal technic. Then, there is a special part dealing with the law of the individual and the body politic. Under the law of the individual, he

[4] [This assertion has gained wide currency among Kohler's reviewers. It is stock criticism which seems to have prospered rather by adoption than independent knowledge of Kohler's writings; and Kohler finds it necessary repeatedly to go over his ground. "The essence of culture," says Kohler, "in the sense of Philosophy of Law, is the greatest possible development of human knowledge, and the greatest possible development of human control over nature." — "Vom Positivismus zum Neu-Hegelianismus" in "Archiv für Rechts- und Wirtschaftsphilosophie," Bd. III, Heft 2, (January, 1910). — *Editor.*]

considers the law of persons and property law. Family law is a division of the law of persons. The law of property is divided into the law of ownership and the law of obligations; and a third division, "property as a whole" is added, under which the law of inheritance is specially treated. The law of the State and international law fall under the division of the law of the body politic.

No doubt there may be various objections to this classification, even from the point of view of an efficient co-ordination of legal notions and legal institutions in detail; and, even more, from the standpoint of a systematic development of this plan. Such a classification as Kohler's is perhaps sufficient to make comprehensible and distinct the detailed phenomena of the law in even a less coherent treatment.

Kohler has deliberately refrained from setting out prominently the principles for the valuation and estimation of the materials of the law. Accordingly, they are found extended throughout the whole work in separate observations; and it is the reader's task to discover from them the internal volume. One may also find in this work the tribute which the contemporary preference and habit of the modern legal philosopher pays, as against the more tense and also more arid methods of earlier times.

And now, there should follow a detailed discussion of the philosophical views and results which have been brought out by Kohler's book. But, here the reviewer encounters difficulties. Many, many years ago the writer himself published a book under the promising title, "System of Legal Philosophy." Some may yet recall it. Up to this time, I had hardly hoped to find for it any warmth of reception, and its influence has very rarely come to my notice. This work has now disappeared from the shelves of the book-dealer, and

perhaps has also sunk into oblivion in the recollection of men. I would be glad to console myself with the thought that the style of the book was too old-fashioned. I had sought to travel again in the paths laid out by Aristotle and Hegel. Kohler, in his own way, has done the same thing, but with greater cleverness, and with a closer contact with modern ideas and modern demands. Naturally, therefore, I defer to him. Kohler in his book had the immeasurable advantage of being able at all points to refer on decisive points to his own special juristic investigations. While I have had a juristic training, yet I have been occupied principally with systematic philosophy; and I am not able to claim any special scientific learning either in the law or any other special department of knowledge, with all of which one so ill-equipped will have to struggle in the treatment of unified knowledge. Nevertheless, whatever the writer might be able to offer in the way of criticism of Kohler's treatise already lies open in the writer's book, and nothing is so wearisome as repetition. It would also be ill-wrought to intrude on a public with a right to new ideas what has long since been advanced.

Kohler and I are agreed on many leading and fundamental ideas upon the ground of a sameness of starting-point, and of authorities which we esteem in common. In method and construction, as well as in the explanation of many detailed matters, Kohler and I are essentially apart. Where Kohler represents ideas which fall in with mine, I find in the concurrence of this distinguished man a highly valuable confirmation of my own fixed beliefs. Where Kohler differs from me, naturally it is my thought that I am right, and that he can do nothing better than return to my notions. It is unlikely that I shall change my mind. Those who possibly may assert that I am altogether beyond conviction do

me an injustice; but, in this case, I have found in fact no occasion to alter, in any essential way, my previous views. The opposition against what does not satisfy me in Kohler concerns a position taken many years ago, and I may be spared the task of quarreling with this eminent jurist about various points of view and results, in view of the fact that, as a whole, I regard this work as deserving of the highest praise.

Indeed, the work as a whole is in my judgment entitled to a cordial reception. It is the result of the ripe reflection on the ultimate facts of legal order of a profound and learned expert and master — the expression of a noble purpose and done with a skilled hand. This treatise is a thoughtful effort, designed to bring out to the beginner in this science, in broad outline, the formative reason in the phenomena of law expressed in the external and human world; and to give with a fullness of materials, and their scientific ordination, an intimate and rich suggestion toward a more profound knowledge of the internal relation of the facts of legal life. It will be a desirable thing if this treatise may be able always to maintain a prominent place in literature, and in the interest of the public. A multitude of ideas which have become lost to the sociological group of thinkers of today may be made accessible through the receptivity of this book to modern conditions, and thus may with a vigorous impulse prepare the way for social advancement.

Third Appendix

KOHLER'S PHILOSOPHICAL POSITION

THIRD APPENDIX

KOHLER'S PHILOSOPHICAL POSITION[1]

BY J. CASTILLEJO Y DUARTE[2]

Kohler's position in philosophy is not easy to understand. In his writings, Sankara, Heraclitus, Plato, the Neo-Platonists, Spinoza, Schelling, Hegel, Savigny, Schopenhauer, Darwin, and Nietzsche pass rapidly in review. It is necessary, in considering this author, sometimes to deal with diffuse ideas and allusions; with general formulas, examples, and figures of speech. Kohler has not yet presented a systematic body of philosophical doctrine which aims to resolve with a certainty of consequence the fundamental problems of knowledge, nature, the law, art, etc. His standpoint at this moment appears to be based on a series of affirmations drawn from many different points and tending to a common center.

It is impossible, therefore, to be assured that we have found in Kohler's works the seed of a doctrine destined to grow and survive; much less, to foresee its definite structure at maturity.

The design, however, of searching in a new avenue of approach for a solution of the always-new enigma of life, with the view of arriving at a completer cultural organization, inspires extraordinary interest, especially when

[1] Introduction to "Filosofia del Derecho é Historia Universal del Derecho," por *J. Kohler*, in "Biblioteca del Derecho y de Ciencias Sociales," Victoriano Suarez, (Madrid, 1910) translated by *Albert Kocourek*, Lecturer in Jurisprudence at Northwestern University, and editor of this volume.

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the problem is undertaken by a man of such unusual learning.

If one philosophic position is ascertained from which a concrete notion may be derived, then no doubt is left as to the rest. Kohler has accepted in these latter years for his doctrines the designation "Neo-Hegelianism." Among the representatives of this new school, with views more or less divergent, are Berolzheimer, Croce, and Mackenzie.

Philosophy, for Kohler as for Hegel, involves interpretation of universal values in science, and their relation to the evolution of the All. It deals with the transcendental and the metaphysical.[3]

This being admitted, what are the foundations in philosophy of Neo-Hegelianism? What does Kohler take from Hegel, and what does he add to him? How does he reconcile his views with the scientific postulates of the last hundred years?

It is certain that Hegelianism, like any other concept which goes to the depths of human thought, represents only a fundamental tendency of which its founder is not the sole depositary, but rather one of many, even though, perhaps, its most eminent representative. The more profound a concept, the greater is its power to nourish secondary outgrowths which ramify in the most conflicting directions, without anything in common

[3] The traditional and the newest views unite in identifying metaphysics and philosophy. Another standpoint (Aristotle, Leibniz, Krause) conceives philosophy to be a department of science, as contradistinguished to history. Descartes on the other hand opposes philosophy not to history but to science. Likewise, Spencer regards science as unified knowledge of particular objects, and philosophy as unified total knowledge. In Comte, the distinction between science and philosophy is less precise. It appears that his philosophy has the mission of building up the Encyclopedia; but his positivism (as in the case of Spencer and Stuart Mill) coincides with Aristotle, the Scholastics, and Hegel in affirming that there can be no science of empirical particulars, but only of the general.

except the primary impulse which vitalizes this derivative movement. What would Spinoza and Leibniz say to being denominated Cartesians?

From Hegel there sprung a conservative or orthodox section of thinkers who sought to keep faith with the system of the Master, holding to his metaphysics, and preserving his dogmas in religious inquiries (Vera, Spaventa, Gabler, Hinrichs, Göschel). A radical left wing also rose up which declared that faith was incompatible with science (Ruge, Strauss, Feuerbach, and the *Hallische Jahrbücher*). The left wing did not halt at positivism and historical materialism (Marx); it went as far even as the most gross form of anarchistic individualism (Stirner). Proudhon, who was under the influence of disciples of the extreme Hegelian Left, considered the realization of perfection to lie in the total abolition of the State.

Kohler thinks that none of the followers of Hegel has succeeded in finding the road upon which the Hegelian system can follow its unfolding course, except that perhaps some of his disciples, especially the Italians (Spaventa, Vera, Croce), have arrived at a more secure orientation.

Kohler's Neo-Hegelianism requires the reaffirmation of the substance of the philosophy of Hegel, and the repudiation of its *form*.[4] It requires the conservation of two fundamental ideas, pantheism and evolution, and the passing-over of the dialectical method as a mere ornamental device. The dialectical process is simply a form of making tangible to our understanding the idea of evolution.[5] The Eleatics, Descartes and

[4] *Berolsheimer*, "J. Kohler als Rechtsphiloseph," in "Philosophische Wochenscrift" (Leipzig), 1906, No. 1.

[5] *Kohler*, "Neuhegelianismus," in "Archiv für Rechts- und Wirtschaftsphilosophie" (Berlin and Leipzig, Rothschild) Jan., 1908.

Spinoza, struggled with the impossibility of reconciling the principle of constant change with the principle of eternal being. According to Hegel, change arises from the union of being and non-being, and he therefore characterizes evolution as the fountain of possibilities from which all particulars emanate.[6] This was his great discovery, although Lao-tsze had already preceded him in asserting that universal being acquired an importance, when out of its abundant possibilities a series of particulars arises and is realized.

The dialectic process, however, which attempts to explain change, and to indicate the function of evolution in the world, is not able to apply itself to the discovery of particular determinations.

Philosophy, doubtless, is able to interpret *à priori* the laws of being, and even can give us with a certain amount of probability some of the final results of becoming; but, beyond this, *à priori* speculation ceases to have any utility, and we are thrown back upon observation.[7] Neo-Hegelianism "takes from Hegel the idea of evolution; it unites the doctrine of Heraclitus with the teachings of the Eleatics, and connects the Sânkhya school with that of the Vedânta system; it accepts Platonism insofar as it admits an ideal background beyond reality; it departs from the epistemological doubt of Kant in affirming a correspondence between our consciousness and the world-process as parts of one and the same unity (in accordance with Tommaso Campanella); it substitutes for the uniformity of Spinoza's system a fullness of life; and puts in place of the Hegelian schematicism (which seeks by dialectical perversion to evolve the world from an idea) a living reality." [8]

Hegel's great distinction lies in his conception of the organization of humanity as a moral unity in which

[6] *Kohler*, loc. cit. [7] *Kohler*, loc. cit. [8] *Kohler*, loc. cit., p. 231.

there is displayed a permanent energy and an eternal life. This unity occupies in its evolution an intermediate position between the dry Allness (*Allsein*) of the Eleatics and the fluid continuity of the Jains represented in Indian philosophy by the Vedânta and the Sânkhya systems. All things must change in order that the thought eternal may come to light. Since time is nothing other than the eternal in its movement, these eternal ideas cannot unfold themselves in time except in the form of movement — a movement that is progressive and not destructive.

Evolution is the history of the super-historical; it is historical by virtue of its temporal operation; it is super-historical by reason of the unity lying at the basis of its movement, which develops at the last only what was in existence at the beginning.[9]

Another important central thought of the Hegelian system, the principle of identity, is also fundamentally modified by Kohler. Kohler, while admitting a transcendental reality behind the phenomenal world, combats the Kantian doctrine, holding that it involves the annihilation of philosophy. As already stated, he identifies metaphysics and philosophy, but in the determination of the nature of ultra-phenomenal reality he abandons the Hegelian panlogism.

Fusing the problem of metaphysics with the problem of knowledge, he says that for the purpose of attaining an understanding of the objective world it is necessary that there be no unbridgable abyss between mind and being but that our entire activity, so far as it generates laws and ideas, must have a co-ordination with the facts of nature. But here, he adds, it does not follow that the relation between the subjective and objective is one of

[9] *Kohler*, "Wesen und Ziele der Rechtsphilosophie," in "Archiv," etc., (October, 1907), I, p. 3.

identity; that being is not the same as thought, and that thought is not the same as being; but that both meet on a superior level like two planes which unite in one line.[10]

Neo-Hegelianism does not confine the whole of objective existence within the matrix of thought. According to this doctrine, thought and being unite in their ultimate extension; in this, that on one hand, the principles of reality have a certain contact with the principles of thought; and on the other, that the final ends of reality have a relation to human aspirations. Neo-Hegelianism seeks to unify the infinity of external facts with the profundity of speculative thought and the objects of humanity's most cherished desires.[11]

Inasmuch as the Hegelian philosophy did not follow this course, it was not able, according to Kohler, to resist the assault of the natural sciences and the voluntarism of Schopenhauer. To avoid this, it was necessary for Neo-Hegelianism to escape two errors: the reduction of the phenomenal world to mere appearance (as was done by Schopenhauer), and the belief that metaphysics is able to exclude the special sciences, and accomplish by its own conceptions that which experience sought to attain only by the most laborious effort.

Our ideas and the universe being separated, according to Kohler, he does not abandon the world as inert matter but assigns to it a certain spiritual content — a kind of unconscious intelligence (perhaps similar to the Schellingian idea of nature) — which manifests itself in the tendency toward an end in a course of rational progress and evolution. Against those who conceive that the two concepts "progress" and "rational" are simply mental representations, he insists that to identify our thought with the idea of the universe is to return to the

[10] *Kohler*, loc. cit.

[11] *Kohler*, loc. cit., pp. 11–12.

Scholastics, who attribute to the Divinity a mental process like our own.

Neo-Hegelianism does not seek, as Hegel does, to infuse into the evolution of the world the categories of reason, without learning through the medium of experience, the laws of universal evolution in human culture. It is possible to discover the fundamental lines of evolutionary progression only on empirical highways. Kohler accepts from Hegel his theory of evolution, the idea of unity in plurality, and the relativity of time (as *à priori* concepts); but seeks to put into these ideas a content (which was yet lacking in Hegel's time) derived from experience and a study of civilization. The rational character of a world of reality is his metaphysical starting point.

The regularity of the rational process can only be valuated in long periods of time. Neo-Hegelianism takes as the object of its investigation the infinite variety of particulars which constitute universal history. It recognizes, however, behind these particulars, a great All, unlimited by time or space, which manifests itself in time as human culture, and which unfolds itself in obedience to determinate laws. Thus, the *reason* of Hegel is converted into *culture*; and the dialectical method is transformed into a history of civilization which is not a chaos of particulars, but a process of change in the service of a supreme end.[12]

The evolution of universal history, according to Kohler, is not as logical as was thought by Hegel, and it does not always play its themes in three acts. On the contrary, history exhibits many illogical and disturbing pathological elements which do not coincide with evolution, but run counter to it.

[12] *Kohler*, "Moderne Rechtsprobleme," (Tuebner, Leipzig, 1907), p. 9, *et seq.*

The force of history lies in this: that ultimately reason always conquers (optimism). Its progress is certain, but it operates in a complex and variable manner.

The Hegelian process of Idea, so far as it relates to mankind, changes to a process of Culture.

Kohler attacks the problem of knowledge as a relation between subject and object. He inquires if there is in fact behind our representations of the world a reality which would exist even though we did not exist, and as to the relation of this reality to our representations.[13]

The hypothesis that our perception of the world does not correspond with the reality leads, according to Kohler, to the emptiest scepticism. The problem of knowledge cannot be resolved by the data furnished by the senses, but only by philosophy. Critical realism, which had already been advanced by the ancients, was attempted by such thinkers as Campanella, and furthered by the Scotch Sceptics. It culminated with Kant, but instead of finding a solution, attained its most acute form. Dualism has been vanquished by the philosophy of identity (Fichte, Schelling, Hegel). The ego and the non-ego appertain to the same universal All, and they must be coincident. The contrary can only be relative and momentary.

According to Kohler, Kant exaggerates the difference between subject and object. For him (Kant) the subject has a place at the front of the world's stage and his mental faculties reach no further than phenomena. He is not in a position to know what moves behind the scenes.

Since Kohler accepts the principle of identity only in part, he is obliged to find a basis of knowledge. The Kantian notion of *thing-in-itself* appears to him to be

[13] "Moderne Rechtsprobleme," p. 3 *et seq.*; "Lehrbuch der Rechtsphilosophie," p. 6 *et seq.*

valid to the extent that all influence over the subject is explicable only so long as subject and object are not identical, and that object makes an impression on subject. This impression is our representation of the world. There can no more be an absolute similarity between our impressions and the world than there can be a sameness between a mould and its image.[14]

The difficulty, of course, lies in ascertaining the point of correspondence; since it is clear that it is necessary to know and to compare the two involved ideas: the image, that is to say, the impression, and the mould, that is to say, the reality. The inquiry turns back upon itself in infinite succession. Kohler accordingly deals with only one of these ideas, the subject. He says that the mind is capable of cognizing its perceptive faculties, and the manner in which they operate when receiving external impressions. He further asserts that the effect of these diverse external impressions is to determine and make permanent the notion of subjectivity as opposed to the objective world. We are also able to demonstrate in the case of other rational entities in what manner their faculties operate, and how the matrix of thought is influenced from without. Employing another metaphor, Kohler says that images are painted on the canvas of our subjectivity, and that this canvas has a definite structure which we are able to know and reckon with, in a determination of what is subjective and what is not. He seeks, therefore, to distinguish the objective in knowledge by means of subtraction of the subjective. It does not appear to be clear here how knowledge of our perceptive faculties and of ourselves is going to escape the problem of Criticism.

[14] "Lehrbuch der Rechtsphilosophie," p. 8 *et seq.*

By another route — the Hegelian doctrine of identity — Kohler seeks a solution of the problem of knowledge, perhaps better fortified. The results of our thinking coincide with the external world. The external forces which impress us operate in the same way that our thoughts tell us, provided that we do not err in our perceptive premises, and arrive at no false conclusions. This results neither from a pre-established harmony nor from causality, but as a consequence of our being a part of the world against which we stand in opposition only momentarily. We are part of a machine, and its movements must be in harmony, so long, at least, as the machinery is in order and does not exhibit pathological defects. Thus, the exactitude of the mathematical axioms, the coincidence of the law of causality within and outside of ourselves, and all the categories of Kant, are explained. If metaphysical truth is not attainable by our intuition, yet it is within the compass of our reason.[15]

Time and space are not, for Kohler, simply an appearance (*Schein*), but are a reality (*Wirklichkeit*). In this view he rejects alike the idea of Sankara, that they are illusions, and of Kant, that they are *à priori* forms of the subject.

The reality of time and space, he holds, are relative because there is behind temporal and spatial evolution a background which is beyond space and time. In the same way, the plurality of being is absorbed in a unity by means of the law of causality.

Kohler's effort is to incorporate the historical and positivistic results of the last hundred years into a philosophical system of Hegelian pantheism; but he has to such an extent attenuated the doctrines of Hegel and admitted with so much generosity the ideas

[15] "Lehrbuch der Rechtsphilosophie," loc. cit.

accepted from him, that certain doubts as to his position are unavoidable.

If we eliminate the results of modern science, and those ideas which no philosophical system is any longer able to accept, what is left will be the notion of continuous change — decomposition and re-composition — dominated by an immanent reason (Heraclitus); or the world-creative idea of Plato; or the entelechy of Aristotle, operating on things as a teleological impulse; or the universal being of Spinoza, to which there is a present tendency to revert; or the original being of Schelling (in its stage of identity); or, perhaps, the Idea of Hegel reduced to a subjective abstraction, in the sense of the extreme Hegelian Left.

It is very difficult to find the root of Kohler's pantheism, not alone because he has substituted for the Idea of Hegel a somewhat vague element which he calls Culture, but also because his point of view respecting the personality of the Deity is not clearly stated. This is true notwithstanding that at times one may note a providential factor, a force which appears to energize the world from without, serving as its model, or driving it along a determinate course. This notion involves vestiges of the Christian (Catholic) doctrine, confined principally to the realm of the feelings and the imagination. One is led to suspect that his religious views in their dual contact with Buddhism and Christianity approximate the concrete monism of Hartmann.

Neither is it possible to assign to Kohler a place among the other followers of Hegel; because at times, for example, he inclines to the Right, upholding the metaphysical view, and combats the materialistic conception of reality; and at other times, in asserting an extraordinary preponderance for history and a world

of limits, he appears frankly to align himself with the Left.

Kohler seeks to throw aside the abstract principle of Hegel's philosophy (the dialectic process), but conserves beyond question in his system an abstract foundation (the notion of evolution and progress which is more than mere change, in that it signifies intelligent direction). But, while it is doubtful whether Hegel extracted evolution from the metaphysical order to apply it to the notion of time, Kohler resolutely identifies it with historical development. He rejects the opinion of Stahl, who considered the dialectic process as an essential element of the Hegelian philosophy, and mitigated it for the epoch in which Hegel lived.

Nor does Kohler hold to the rationalism of Hegel and affirm it for his age. He is not an intellectualist. He rather takes a position which has a certain correspondence with that of Lange.

Against the dualism ascribed to his system, between the historical world of experience and the world of ideas, Kohler asserts a unity of the rational idea and reality, in that the complex of particulars of the world is simply the emanation of divine thought.[16]

Kohler's place in metaphysics resembles, by analogy, that of Wundt, who like Fouillée, attempts a metaphysical theory based on experience. For Wundt, metaphysics is the final hypothesis admitted in the present state of the empirical sciences; it is an evolutive construction. Wundt, however, contrary to Kohler, does not concede a metaphysical object, or absolute being.

Kohler's method of presentation of his system is in common accord with the spirit which seems to dominate modern philosophy. The past few years have

[16] "Moderne Rechtsprobleme," p. 11

witnessed an expansive intellectual movement, and a popularization of knowledge comparable to the age of the Sophists and the Encyclopedia. Philosophy has ceased to belong to the institutions of learning and to the learned; it has become the possession of the world, and an object of common knowledge.

The extension of philosophical knowledge attracts other pursuits from the retreat of professional seclusion and the refuge of closed doors. The Sophists spread philosophy among the upper classes, but Socrates carried it to the street. Plato, in turn, confined it to the Academy, and again made it professional. The popular, dilettante, and propagandist philosophy of the time of the *Aufklärung*, which was represented in different ways by Rousseau and Wolff, was succeeded by the intensive reconcentric labor of Kant and Hegel.

The current age has laid hold of the philosophies of Kant and Hegel, dragged them from their sanctuary, and cast them before the world. It has done this apparently only to destroy, but in reality to bring these philosophies into the fullest contact with life.[17]

This assimilation has resulted in much good, but it has also had its price in a certain inconsistency, and certain defects of logic which characterize modern philosophy, after the manner of the eighteenth century.

Kohler's theory of law is more fully developed than his philosophical system. This is true, not only on account of the substantive content possible in his theory of juridical culture, but, perhaps, more especially, because it embodies, in diverse aspects, modern scientific aspirations.

It is interesting to note in this connection that the philosophical part of the Juristic Survey of Holtzendorff was first committed to a Krausean, Ahrens;

[17] Vide, *Croce*, "Ciò ch'è vivo e ciò ch'è morto nella filosofia de Hegel."

afterward to an Herbartian, Geyer; later to a positivist, Merkel; and finally, as by way of reversion, to close the circle, to an idealist, Kohler.[18]

It may without doubt be asserted that it was not simply his pantheism, nor yet alone his spiritual idealism which has brought Kohler to the position taken by him; but rather the coincidence of other influences which distinguish the age. These influences are the reconstruction and advance of a conquering positivism; the acceptance of evolutionary ideas; the universal and scientific character of comparative law; the desire to conciliate the struggle between monism and dualism; the polarity of moral ideas; the place assigned to culture in history; and the infiltration of an ethical ideal into the entire juridical groundwork of life.

Where Kohler appears to have departed from the path indicated, as in the problem of the functions of the judge and in the nature of punishment, his theory has found little echo.

The whole movement of modern philosophy of law, considered in the totality of one of its most characteristic aspects, represents a fusion of the ideas dominant in the eighteenth and nineteenth centuries.

In the eighteenth century the current of thought which has received the name dualism reached its greatest perfection. It produced a conception of law as something universal, perfect, immutable, absolute, and eternal, as distinguished from another law that was contingent, relative, established, or imposed. This

[18] [Vide, *Holtzendorff*, "Enzyklopädie der Rechtswissenschaft," 6th rev. ed. (Duncker und Humblot, und J. Guttentag, Leipzig and Berlin, 1904), which contains Kohler's monograph above referred to—"Rechtsphilosophie und Universalrechtsgeschichte." For a list of the literature of Juristic Survey, see *Gareis*, "Introduction to the Science of Law" (Vol. I of this series), The Boston Book Company, 1911, p. 27. —*Editor*.]

unchangeable law was thought to be immediately applicable to social relations in every country and in every age.

Nevertheless, the sharp-edge of the dualism of Wolff or Kant, which was the product of an old process of ideas, did not hew the line of an epoch in philosophy except to mark the boundary of another age of thought. While dualism appears to have been finally cast aside, yet from its fundamental idea new forms of thought have arisen.

Among the incipient forms of philosophic thought which preceded the culmination of dualistic speculation or the attenuated variations which followed it, there are extremities of shading, so that it is impossible to say with precision whether they should be denominated dualistic theories or not. This doubt exists even without going to the extreme of a Bergbohm, according to whom, no one is wanting in contact, to a greater or less extent, with dualistic contagion, unless it is himself.[19]

The eighteenth century with Montesquieu, Wolff, the Encyclopedists, Rousseau, and Kant presents the culminating point of a curve which surveys the whole historical evolution of the Philosophy of Law. This curve exhibits a continuous series of shifting positions so that only observations of the greatest generality have a common point of view.

Among the Greeks, Philosophy of Law appeared to attach itself to the inquiry as to whether legal standards were natural or artificial products; whether the distinction between justice and injustice proceeded from nature, or the laws and customs of the people. In the language of our day, the question was whether law had a metaphysical basis.

[19] Not even he is free from it, according to *Neukamp*. *Stammler*, also intimates that an exposition of Bergbohm's system discloses dualism.

One group (Archelaus, Protagoras, and other Sophists) regarded justice as a category created by the laws. Another group (Hippias, Callicles, and another division of Sophists) declared that positive laws were contrary to nature. Aristotle clearly formulated a dualistic theory of justice. He held that there is an immutable law which is the product of reason, common to all men and universal; but without constructing a code of this law after the fashion of the eighteenth century. His law of reason was rather a living law like the *jus gentium* of the Romans.

Man, however, has a relation that is other than universal. His activities exhibit particular relations to which the application of this universal law is insufficient. There is another positive constituent of total living law which does not appear to arise from an universal and common source (reason), but which is generated by an historically circumstantial agency, the will.

Aristotle's dualism, therefore, is not based on a divine plan (as was the case with St. Augustine, who Christianized Plato); nor is there in his system a rational order of justice which the world must approximate. The universal element of human reason cannot govern the totality of life's activities, but must leave them in part to the influence of other forces. There is, therefore, no opposition between two codes — one a perfect and rational order, and the other an imperfect and positive system (Wolff). There is not even a competing double standard of certain eternal ideals, and a mutable and historical reality which seeks to approximate the former (Ahrens); nor even yet a twofold order consisting of an absolute principle qualifying the just and a series of relative propositions which are measured by the absolute (Stammler). Natural

law and positive law are two parts of the same active, unified reality.

The Middle Ages rejected the immanence of ends in the world and consigned this finality to an external abiding place. St. Thomas combined the theory of Aristotle and that of the Roman jurists with the philosophical doctrines of the Church Fathers. Natural Law is now thought to arise from divine reason (from divine will, according to Scotus), and consists only of certain basic principles. Positive law has the mission of elaborating the natural law for man, through practical reason, by concrete application to the activities of life, according to its circumstances and conditions. There are certain standards of positive law which are not derived from Natural Law, and which even conflict with it. This proposition is the Aristotelian dualism. The positive laws which contradict the Natural Law are unjust; they have no force.

Neither Grotius nor his followers changed the fundamental aspects of the Natural Law problem. What they did was to divorce law and theology, to elevate the function of reason, to secularize law, and to emancipate it from divine will, religion, and the Church, in an effort to derive the standards of law from the processes of the human mind. Their effort was to make all positive law natural, thereby destroying every legitimate premise of pure history. Thus, the way was made for the revolution.

This speculation marked the culmination of dualism. All legal standards were derived, by a fettered logic, from the reason. There did not remain any necessity to supply it with the empirical experience of the external world. These standards were regarded as absolute, immutable, and universal. They were the imperatives of a light of reason which could be seen with

equal clearness by all men. They constituted the limits of an abstract liberty. Legislation (the perfect, unified form of positive law) was thought to have no other object than to express the commands of reason. Positive law, however, does not in all respects coincide with the rational law; since, according to the Kantian notion, man is not only *noumenon* but also phenomenon. The phenomenal man is able to and does effectively detach himself from the dictates of reason which makes law and compulsion necessary. There is a radical imperfection in man, and this is the definite cause of dualism. To the extent that positive law, the product of the will of the legislator, does not harmonize with the law of reason — and it should harmonize instinctively — it is unjust, and is not law.

The eighteenth century, taken in its entirety, held the notion of an eternal, perfect, absolute, and immutable law; it had an aversion for history; it made a distinction between the governing and the governed; it regarded law as the product of reflection; it considered the legislative function as belonging to experts, science, and the governing classes; and it adhered to the belief that there was a pre-juridical state of nature. This state of nature, on one hand, was thought to have been one of happiness (the Paradisiacal state of Rousseau); and, on the other, was conceived as a condition of violence (Hobbes, Kant). The state of law, it was thought, emerged from this antecedent state by way of compact of the people.

Dualism thus reached its most acute stage. This statement is true in a double sense. First, Natural Law no longer was an aggregate of general principles, but contained the concrete standards of the whole juridical system even to the last details. Second, Natural Law no longer contented itself with being an ideal, but

considered itself as directly applicable to the affairs of life, and declared its opposition to positive law; now in a temperate and pacific manner (as an intelligent despotism), and again in a violent form (by way of revolution).

Against all this a conservative reaction set in with the beginning of the nineteenth century. This reaction came with the fusion of Romanticism (which had already developed in literature, art, and history), the labors of the Romanists and Germanists, and the influence of certain political economists, commingled with other contributory forces.

The Historical School, the schools of Schelling and Hegel, positivism, and Christian theology, in a variety of points of attack, combated dualism as it had been formulated in the abstract doctrine of Natural Law and by revolutionary liberalism.

True it is that certain factors in these new doctrines persisted, which established a new form of dualism, or at least diminished the force of the monistic conception. Among the newer ideas which pressed forward against dualism in its older form may be mentioned: the *quid mysticum* of the conscience of the people; the notion of law; the concept of law in itself, and for itself; the idea of pure positive law which sets up standards arbitrarily, that is to say, limits what is allowed and prohibited; the view of the existence of divine commands; dogmatic teachings; and the ethical element. These ideas in their entirety represent a movement of protest, and establish, against the older form of dualism, a contrast which appears to be irreducible.

Nevertheless, all modern Philosophy of Law seems to be inspired with the effort to reconcile both positions: that is to say, the historical, variable, and accidental; and the absolute, metaphysical, and necessary. Modern

theories deny the existence of a concretely definite ideal: thus Schäffle, Schuppe, Kohler, Stammler, and others among the Germans. These theories contradict the affirmation of the eighteenth century (which Spencer nevertheless supports) and seek to make composition between the relativity which was opposed by the old Natural Law and absolute principles. This absolute principle for Stammler is *à priori*, and according to Merkel is *à posteriori*, but conclusively apodictic.

Kohler's system is one of these efforts, and of them is the most interesting on account of the multiple bases which support its elaboration: the positivistic, historical, Hegelian, and teleological elements.

Kohler combats the idea of Natural Law without reserve. According to him, there is no law but the positive law, which manifests itself in every people, and in every age. He parallels the Historical School, Hegel, Stahl, and even Bentham; but he does not accept as the radix, as the basis of his system, the mystical and transcendental conception of a "Volksgeist," or the dialectic process, or the theory of divine will, or the maximum of pure pleasure. The fundamental pantheism of his system does not energize the world of law; but with its elimination of the dialectic process tends, perhaps, to a quietism of the type of Spinoza. In place of the dialectic process, Kohler substitutes two elements presented by the prevailing thought of his time, evolution and culture; or better, cultural progression. The law is equally the end and the means of this culture.

When the interrogation is put as to what this culture is, and what part it plays in his system, one is assailed by certain doubts; since when different passages of his writings are compared, two wholly different ideas appear to be presented. At one time, he ascribes

culture to the totality of life, to the state of a people, in which sense the term has a formal meaning, without reference to the content of the idea. Thus, we are accustomed to speak of the civilization of the Aryans or the Mexicans, meaning to express the idea of the life of the people regardless of whether it is good or bad, superior or inferior, in the social scale. Thus, also, one speaks of the art, or the language of a people, as one of the aspects of its social life, with reference to its relative perfection or imperfection, and without furnishing any criterion for discrimination. When Kohler says that each stage of civilization carries its own foundations of cultural postulates, he employs the term in the sense indicated. Finally, if he comes to the thought that law is an element of this culture, then he has reached the stage of pure positivism.

It frequently appears that, for Kohler, culture is not the content of the life of a people, but a certain element more or less vaguely concrete; or at least, that it is a tendency, an approximation, toward a certain ideal, or perhaps only the unfoldment of determinative influences. In this sense, he speaks of the forces which favor or retard culture, of the necessity of the realization of culture by a people, of the culture established by superior men, etc.[20]

This is, however, not the only thing which Kohler sets apart from a pure positivist relativity, since the idea of evolution is the other pole of his system. He does not accept the Darwinian evolution with its mechanical play of chance, or, at its best, with its struggle and selection. Evolution is more than a mere transformation; it signifies organic causality. The world is made

[20] [See, as to the various uses of this term, *Rudolf Eucken*, "Les Grands Courants de la Pensée Contemporaine (translated from the German, Paris, Félix Alcan, 1911), p. 295 *et seq.* — *Editor.*]

up of eternal elements in organic unfoldment. That which is manifested in time springs *ab æterno* from divine being, of which the universe is the permanent emanation. The formative progression of the living universe employs the forces of nature in the service of an idea and an immanent end displayed in the entire process of history. That this end is for us occult is of no consequence. Its existence is revealed in the wonderful teleology of history.

Finally, one finds in Kohler's system a third element of unity — the function of law. Culture is something different in every age and every country.[21] Every civilization has its cultural postulates; every national spirit has its own ideals; and every historical development has its progressive and repressive influences. That which is good in one place is bad in another; that which is rewarded here is punished elsewhere. The law accordingly manifests itself historically, in multiple and contradictory forms. Its function is, however, always the same. Its mission is to be responsive at every moment to the postulate of culture, and the impulses of universal spirit. It cannot determine *à priori* the intervention of accidental causes, but must spring inductively from the empirical materials provided by universal history. This method makes possible a legislative policy [*Rechtspolitik*] with judgments of legislative values. Law has the object of furthering and protecting an evolution teleologically adequate (*bestimmungsgemäss*) to the social organism. It is like a watch which, though keeping accurate time, cannot indicate the hour for the whole world.

The three factors upon which the transcendental element seems to be based may be considered from various points of view in Kohler's system.

[21] [See *Kohler*, "The Mission and Objects of Philosophy of Law," in "Illinois Law Review," Vol. V, No. 7 (Feb., 1911), p. 427. — *Editor*.]

First, it remains to be determined if culture involves an element absolutely material or formal, or, if everything, including the Idea itself, is thrown back to historical relativity. From the statement defining culture, that "the development of the forces which are inherent in humanity is constructive of forms which correspond with the destiny of this humanity," it appears that both elements, the forces and the end, are immanent (Aristotle, Hegel).

Again, evolution, which embraces the ideals of humanity, is not a process left to blind hazard, nor yet to the eternal repetition of the identical cycles of the Greeks. But we are not able to say if the way leads with Hegel, making philosophy a logical process; or whether it is with Schelling, in a regression of the finite to the absolute—the equivalent of the creation and system of the world.

Kohler does not limit his notion of the culminative point of evolution, as did Hegel, to the cultural forms which are the mere products of his time (Christianity, the Prussian State). An era of positivistic realism has not passed in vain. Kohler believes in a constant advancement. We learn from him that the future leads to a union with the Divinity; but it is not easy to gather how the separation occurred, or what will be the reintegration. The over-men, by intuitive perception, perhaps, may hit upon the upward path in history, and may be able to mark out the road.

Finally, the function attributed to law is subjected to the oscillations peculiar to the systems which embrace the elements of teleology, history, and human liberty. In that law is the product of the culture of each age, and, in that it is also able to promote the culture of the future, it is necessary to discover within it the mysterious seed of evolution. Since Kohler rejects

a history derived *à priori* after the Hegelian method, there is not left to us anything but an empirical process of which we are the witnesses, a development of law such as was thought of by Savigny; except, that there has been substituted for the spirit of the people, the abstract notion of culture, or even more vaguely, the amorphous conception of universal being. This, however, is not the view of Kohler, for whom the will and human initiative play an important part in the drama of life. It is certain that man's activity is simply an irradiation of the universal, divine activity; but the capacity of anticipating the designs of the Absolute being reserved only for certain privileged ones, culture appears to be an idea in the Platonic sense; and the law accordingly directs its flight away from the experiential world from which Kohler nevertheless would not release it.

These are the outlines of the effort of philosophy, to which reference was previously made, to reconcile the apparently irreducible elements of dualism. Where Kohler employs the idea of culture and its postulates, Stammler substitutes principles of law conformable to a just standard; but Stammler's principles, on account of their Kantian origin, take on a formal character and are, or seek to be, simply a method for the discovery of the justice or injustice of positive law as a whole. In like manner, Stahl asserts the conception of divine commands; Krause posits a rational and absolute end of life, which is relative in each concrete case; and Spencer relies upon an absolute morality as the law of the perfect man and of life conformable to nature.

Kohler does not deny this fundamental analogy, but nevertheless he resists the substitution. For example: he combats Stammler, declaring that his theory of

justice (*richtiges Recht*) is a revival of the old Natural Law, because there is in it a material content; thus, where Stammler condemns the injustice of slavery. Stammler aspires to arrive at an absolute standard which shall have the function of testing at every moment the justice or injustice of the juridical material which history alone can supply. He is in accord with Kohler in believing that law is the cultural product of its own age; but he contends that the legal standard is not the test of its own justice. The standard of justice is derived from an absolute *à priori* principle, different, however, from the conception of the eighteenth century, in this, that being purely formal it cannot be the material of a positive code. According to Stammler, the ideal of law is immanent; for Kohler it is transcendental.

Kohler admits that there are always definite standards, but that they vary from moment to moment. Each epoch has its ideal principles which are, for the time, standards of justice. These temporal ideals are united fundamentally as phases of a unified process.

At times, Kohler reverts to the Hegelian rationalism, which he seems to have abandoned. Thus, he says, that law is the reason of the infinite, which manifests itself in history, and guides its course in accordance with the ends of the universal process.[22] Hegel, however, appears to take *idea* for his starting-point, while Kohler commences with *fact*, and by means of this fact employs a positive method of investigation. In Hegel's system, one may say that the rational is real, and according to Kohler's view, that the real is rational. Kohler accepts positivism and the historical method based on a transcendental principle; while Hegel, who

[22] *Kohler*, "Wesen und Ziele der Rechtsphilosophie," in "Archiv für Rechts- und Wirtschaftsphilosophie," October, 1907.

fell in with the influence of Natural Law, seeks to incorporate in it the empirical facts of history.

When Kohler speaks of the universe as manifestation of the Divine Spirit, of history as the unfoldment of a force derived *ab æterno*, of social and juridical institutions as infinitely variable forms of a unified process; and when he asserts that law is the product of the cultue of each age, when he justifies the phenomena of history, and combats the Scholastics as having declared of absolute validity certain maxims of an ecclesiastical and Christian origin, he seems to incline to a position of quietism. He appears to regard the world and the manifestations of social life as an objective process which man may contemplate and analyze, but may not alter. This is a point of philosophical collision which has precipitated a conflict among thinkers from the most diverse camps: thus Hegel, Savigny, Bastiat, Spencer, and the epiphenomenalists.

But, on the other hand, Kohler combats positivism and the Historical School, when he holds that even though there is not a law absolute for all ages, yet there does exist a permanent standard which is the relation between law and culture. The standard is applicable to a variable content allowing for differences in the conditions which the standard embraces. Nevertheless, there are times when the law diverges from culture.[22] This divergence is necessary in order to maintain their general accord. Moreover, the law is an instrument for the furtherance of culture; and it is necessary that it be employed for that end by the application of force. Behold, now, how the pendulum of Kohler's reasoning swings toward a mediation which surpasses the artistic,

[22] This is the problem of historical accident, which, since the time of Hegel, has been a subject of controversy. Kohler (like Marx, as against Kirchmann and Feuerbach) inclines to admit a distinction between the real (the rational) and the accidental.

previsory, and purely acceleratory method of a Comte, to reach the abstract realism of the eighteenth century or the finalism of Ihering — the two positions to excite his greatest aversion.

It appears as if Kohler desired to harmonize the activity of man with universal being, in a form analogous to that in which Christianity considered human liberty to be exerted within the plans of Providence.

Although law, according to Kohler, is the historical product of the culture of each age, yet he assigns to it a finality. Whatever may be the way in which these two ideas are reconciled in his system, there is no doubt that this teleology frequently appears in his writings. It is not eudœmonism (and Kohler is careful to accentuate this point), but yet, unmistakably, it is law with an end. It has already been pointed out that to reach this position Kohler has, perhaps, to some extent abandoned the Hegelian standpoint. Hegel, likewise, held to a teleological explanation of the universe; but it was a teleology of Idea. In this transition of viewpoint Kohler approaches Ihering, his greatest adversary. The only difference is that Ihering speaks of *happiness*, while Kohler substitutes *culture* as the finality.

The question nevertheless recurs, what is the end of the law? Kohler insists with the greatest vigor that the ideal of humanity transcends the pleasures of the senses, and that it towers over earthly existence and the possessions that go with it. He inclines toward a Cartesian spiritualism. He looks with a certain disdain on the inventor of the distaff, and the discoverer of sterilized milk, who seek to promote the well-being of life by providing improved forms of food or clothing. While such efforts are good, yet they do not attain the splendid ideal disclosed in such a creation as Tristan. There is evident here, therefore, a standard of valoriza-

tion, when he contrasts in a somewhat Puritanical sense the grosser things of life with an elevated ideal. It is not easy to understand this repugnance for the material things of life, or to see why the winning of bread may not be in its own way as deserving of praise as the Victory of Samothrace. In any event it appears, according to Kohler, to be certain, that the ideal does not rest on the method or the spirit of an activity, and that it does not invest a mere method or form of activity with a noble or sublime character. This character is determined by the content of the activity itself. The ideal of life has always for Kohler a definite substantive nature. He acknowledges that each epoch has had its own ideals; but here an *à priori* principle arises to declare some of these ideals more elevated and more refined than others.[24]

Kohler thinks that modern culture is entirely the product of Christianity,[25] which brought about, he says, a new conception of the world. It moreover appears that in arriving at the Christian point of view of the Middle Ages, he gives to Christianity a special meaning, attributing to it a renouncement of the world and the tormented pessimism of a Calvin; and he looks away for the moment from the placid optimism of St. Clement, St. Gregory of Nice, San Juan de la Cruz, St. Francis, and St. Theresa.[26]

[24] Certainly a more exalted standard. "What evidence would there be," he asks, "of our efforts and struggles since the thousands of years of the existence of humanity, if it were not for the monuments of the arts and sciences?" This calls forth to him the verse of Leopardi: "Dimmi, o luna: a che vale — Al pastor la sua vita?" ("Die Entwicklung im Recht," in "Grünhut's Zeitschrift," XIV (1887).)

[25] He refers, obviously, to European civilization and the civilizations influenced by it; excluding, for example, the Japanese culture.

[26] Goethe and Hegel describe the Middle Ages as an epoch of gloom, austerity, and obscurity, which has its similarities among the Cynics, and the ascetics of Thebes. According to Hegel, art ended with the Greeks, and while in the Middle Ages the background of creation was limitless, yet it lacked adequate form. This conception of the Middle Ages is today a matter of deep controversy. In this connection, it is

It is a matter of uncertainty if the ideal of which Kohler speaks is within us or external. At times he seems to incline to the position that while science takes as its standard the reality of the objective world, that the transcendental standard of ideality does not reside in the law, in morals, in language, or in the arts. This peculiar and somewhat Cartesian view assigns to science a privileged position. By itself it would leave without explanation another notion from which Kohler draws a definite ideal of life. This conception of the nature of science approximates somewhat the position of Lange, according to whom, science begins and ends with observation, with the study of particulars. He looks beyond science for that which transcends the objective world, and which is necessary to make complete the knowledge of life; thus, for example, the æsthetic ideal, the moral ideal, religion.

The cultural values which law has the mission to promote, according to Kohler, are of various kinds: thus knowledge (science), contemplation (the arts), the metaphysical sense (religion), and force (dominion of the world). He states these elements without superior relation or preference among themselves.

Kohler's juridical ideal is of the kind that we may designate as an Hegelian aristocracy. Law which is intended for the people should not be plebeian. It must be permanently ideal and educative. It cannot draw its inspiration from the indolent contentment of the masses. It must precede evolution, carrying aloft the torch of culture.

enough to mention the care devoted to the human body, the tournaments, the richness and gayety of Venice and Florence in the fourteenth century, the complexity of municipal life, the easy form of the architecture and the agreeable French sculpture of the thirteenth century. Dante is melancholy in the Inferno, and so, likewise, were the Cynics. There is, however, nothing of sadness in St. Francis of Assisi, or Petrarch.

Similar observations must be made of the Renascence as favorable to terrestrial things, if one thinks of Luther, Calvin, or Savonarola.

He tends to draw away from mere reason, reflection, and authority, and appears to submit the problem of law to the province of feeling, intuition, and the afflatus of creation; from which viewpoint he arises to the concept of the Superman, and his function in the world's history.

The opposition between heaven and earth finds its counterpart for Kohler in the distinction between superior entities and the masses. The consciousness of the people is dualistic as compared to the insight into life of the Superman. It remains to determine upon what these ideas rest.

Every man is the child of his age, according to Hegel. The distinction between the superior ones and the multitude is simply a phase or aspect, and rests on a full penetration of the antecedent and consequent conditions. It is not the function of culture to pull up by the roots from the common people, personalities of genius who shall thenceforward remain apart from the inferior elements of life; but rather to elevate popular consciousness, and cause it to generate superior individuals who recognize themselves as and are a part and products of a general human whole. The consciousness of the great ones is only the reflex form of popular consciousness. Culture, like language, is a product of the social community, in the formation of which the common people and the superior entities exert a common effort, even though in different ways. The genius and the multitude alike are the instruments of universal reason.

It does not appear to be possible here to compose the viewpoints of Kohler and Hegel. In the various problems which are connected with this notion (reason and feeling, reflection and spontaneity, Superman and the masses, etc.), the solutions to which Kohler inclines perhaps require other premises.

The emancipation from the locked-in fixedness of rationalism, and from regulated social shackles, is represented by the movement of enlightenment (*Aufklärung*). It gave free play to the expansive force of individual thought, it produced a respect for great accomplishment, and gave a value to intuitional power and the internal vision. It inspired a depreciation of Philistinism, and the inconsequential littleness of political life, and sought refuge in the life within, in science and literature, and in the simplicity of nature. This movement culminated in German humanism, in the philosophy of faith (Hamann, Herder, Jacobi), and in the completely romantic development of thought of the first third of the past century.

It cannot be doubted that, as against this general current, there were opposing forces in motion. The Historical School elevated the value of customary law, and considered it as derived immediately from the consciousness of the people, as the single fountain of all legal rules. The same Romanticism, however, which was represented by the Historical School, sought, on the other hand, to break through social trammels, conventionality, and external considerations. It raised up a pedestal to genius and therefore separated it from the masses. Recognition of a principle of superiority and inferiority among the people, in truth, renders the superior ones exempt from the rules which govern the common people, attributing to them a personal standard of law and morals, or absolves them altogether from the restraint of legal rules; but if we go a step further and say that the creations of men of genius descend, with greater or less speed, or with more or less perfection, to the multitude, then we arrive at a government of the learned, and approach an enlightened despotism, or a reign of doctrinalism.

The notion of considering the genius as the social product of an age, reducing his function to the expression of that which is in any manner already present in the consciousness of the masses (Hegel), harmonizes with the idea which regards superior talent as the highest point of an indefinite series of social capacities in which humanity finds, by progressive steps up to the highest, a realization of its conceptions in a form more immediate and less amorphous (Giner de los Rios). This is not, however, the view of Kohler. His position here is a reminiscence of the heroes of Carlyle or the "hommes supérieurs" of Renan notwithstanding the attenuations which the age imposes on this romantic amoralism.[27]

Considered as a whole, the position with the closest affinity to Kohler's is probably that of Nietzsche. He speaks frequently of Supermen. Law has the mission of favoring the expression of superior talent and of giving to it a wide scope of activity which its social function requires. A people is not great because of the happiness of the greater part of its constituent individuals, but only when it has men of genius who open up new avenues of culture, even though otherwise it is deep in misery. Above all, the Superman is for Kohler the moving factor of culture; and culture predominates in artistic creation, invention, and great ideas.[28]

If it is sought to inquire of what the superiority of

[27] "We are removed, today, from the historical views of the good Schlosser who would judge of great men according to the cathechism . . . just as if man had no other mission than to live an honorable and orderly life, and as if there were no distinction between a superior individual who blazes new paths and a village school-master, than that the greater one made more conversation about himself than the other." — *Kohler*, "Aus Kultur und Leben," Berlin, 1904, p. 6.

[28] It is to be noted, that in Kohler's opinion the fundamental idea of the system of Nietzsche is Hegelian; and that his merit lies in considering personality not as having an individual value, but in that personal activity has a significance for history. See "Moderne Rechtsprobleme," p. 10 *et seq.*

men of genius consists, as to what is its origin, its content, and its scope, in order that we may be able to trace the dividing line between abnormal capacity and insanity and deal with genius according to a standard of excellence, we may note certain differences of idea between Kohler and Nietzsche.

For Nietzsche, the Superman comes from the midst of the people in a kind of Darwinian evolution. According to Kohler, the Superman partakes to a greater or less extent of the character of his people, because otherwise he would find no reflection in the element of his origin; but he arises from the mass according to a plan which appears to be of divine pre-arrangement. The Superman discovers by an intuitional process the highways of culture. He is the guide; but more than this, he is even the people itself, and is therefore the beginning and the end of the law.

Since, however, it is presupposed that there is a road which culture is to follow and a destination to be arrived at, it appears that Kohler's notion of the Superman is not the same as Nietzsche's. Kohler's point of view is rather reminiscent of the system of Plato. According to Plato, the superior man is one who looks upon the pure light of Idea, the essential and immutable reality, who penetrates with a synthetic vision the realm of truth, laying aside material feelings and sensations, and, divorcing himself from the sensible world, raises himself up to a semi-divine life in which perception of, and participation in, the pleasures and pains of the external world have their proper place. Placing him at the head of the State he ascribes to the Superman a nature superior to the spiritual level of the masses. Kohler, contrary to Nietzsche, allows to his Superman a love of his neighbor which he regards consistent with a love of the humanity of the future, and a struggle for

the ideal. He would have him exert his efforts within the law and subject to political order. Those anarchistic spirits who do nothing except to destroy, he looks upon with disfavor. Finally, Kohler is apart from Nietzsche where the latter considers Christianity as the morality of decadence. Kohler says that the renunciation of the world was not an essential principle, but only a temporary, evolutional phase necessary in its age.

There is a certain tendency in Kohler's Superman to dominate the course of history, to order life and the world, and to employ violence according to the exigencies of his ideal and in favor of the objects of culture. (Compare, by way of example, the function attributed to military chieftainship.)

After the manner of Hegel, Kohler looks upon the State as the realization of the ethical ideal. There is, however, a difference. Hegel builds up the State by a logical process through the controlling force of the *ethos* (family, civil society, State) as the last degree of the objectivation of the spirit which unites in law and morality. Kohler places historical experience at the base of his construction, and directly justifies the products of reality by metaphysical principles.

For both thinkers, the State is the divine spirit which unfolds and organizes itself in the objective world. Each uses the ideas of his age as an *à priori* basis of his system. Hegel takes constructive rationalism and the principles of Natural Law, which, by means of a logical process, cause him to fall in with the bureaucratic monarchy of his country and his age. Kohler starts with an analysis of the empirico-historical process and the principle of evolution, which justify in his system all the social phenomena which are the result of a living reality, so far as they are modes of realizing the cultural forces which are manifested in universal history.

History and comparative law demonstrate to us a transition among peoples from totemism to sachemism, then to military chieftainship, and at last, to monarchy, etc.; but this process does not appear everywhere under the same conditions. It is a movement which depends on a variety of factors, among which the spirit of the people is highly important.

Kohler, however, encounters certain facts which appear to have a value for universal history; for example, that mankind has developed out of social groups more or less differentiated, through a cultural ferment by which it has detached the personality of the individual and gained his liberty. He accordingly combats the principle which serves as basis for the social contract.

Civilization is able to unfold only in the womb of such communities. Since, however, there are forces opposed to and destructive of civilization, and it is necessary to combat and overcome these hostile interferences, the State must be an authoritative entity of power and permanence.

What value does Kohler concede to the element of judgment, and what value does he attribute to the element of spontaneity in the State? If one is to adventure an answer, it will be in favor of the thought element over that of the unwilled element.

There can be no doubt that Kohler admits a semi-conscious and customary development of legal life among the masses of the people; but taking a teleological view of the State, this legal unfoldment appears to him to be slow, weak, and imperfect; and he prefers the initiative of legislation on which he places all his faith. It is necessary at every moment to regard the ideals of culture. These ideals are revealed partly in history itself, and partly outside of it, by means of

superhuman intuition. When the directing spirits, the Supermen, and the legislators have once attained a consciousness of this ideal, they must establish it by all the means within their control even to the severest violence. In this action there is a limit which marks the appropriate domain of the individual, in which the activity of the State is excluded. This individual province is not, according to Kohler, an absolute principle like the so-called "rights of humanity," but has relative limitations, determined historically and circumscribed in the last analysis by the supreme standard of the exigencies of culture.

At this point Kohler perhaps somewhat moves away from the quietistic notion of Hegel that "philosophy always comes too late" to rule the world.

At the same time, Kohler takes a teleological position with reference to the State, like Plato, Aristotle, or in the sense of the liberalism of the eighteenth century, and in the naturalistic view, of Hegel, as the product of the evolution of the All.

Sometimes, and especially when examining the historical forms of the State, Kohler reverts to the formula of Schelling — the State is a natural thing, like a plant — and even to Lamarck and Darwin — the causal notion of struggle, selection, adaptation, heredity, etc. The characteristic feature of Kohler's position is unmistakably the desire to fuse together the complex elements of modern science.

He does not, however, align himself with Aristotle, or with Grotius, or with the eighteenth century in conceiving the State as an organization designed for the ends of individuals, or as a product of the will. Perhaps, he rather approximates the position of Plato who regarded the State as an organism; with this difference, that Kohler substitutes Culture for the Idea of

Plato's sytem, in the service of which the individual and the State contribute alike. Kohler's inclination toward a sophocratic *régime* is also suggestive of Plato, although Kohler does not accentuate as strongly as Plato the secondary place assigned to the amorphous social aggregate. The Greek philosopher elevated the importance of the ruler over the law, while Kohler places more faith in the law than in the function of the law-maker or the judge.

This preference for the law does not arise from a rationalistic and universalistic turn of thought such as prevailed in the eighteenth century; it does not proceed either from a notion of legal infallibility; and it also is not based on any distrust of those who exercise governmental power. It is predicated rather on the belief that the law is the most perfect instrument, and above all, the most expeditious means of ministering to the complex necessities of modern life.

Kohler, like the Greeks and Hegel, does not attempt a justification of the State. History presents the State to us objectively, even though in relative and variable form. We know on *à priori* grounds that it is the great instrument promotive of civilization. Within the State alone is it possible for humanity to find the road on which its ends are attained. At this point causality and finalism amalgamate.

With reference to the problem of the extension of the scope of the State, it is sufficient to say that Kohler combats the eighteenth century notion of the *Rechtsstaat*, and on the contrary assigns to the State the function of promoting human culture within a definite territory and by means of its own proper laws.

In a determination of the sphere of the State's activity, Kohler occupies a middle ground (as with reference to

his notion of law) between those who seek an absolute principle, and those who look to historical relativity. Perhaps, in this concrete position Kohler assimilates Merkel more than any other thinker, although he combats his fundamental idea of the general theory of law. Merkel contends that the State has the function of maintaining a juridical system as the necessary agency for the guaranty of such interests as it may at the time regard as of importance. The interests which are held to be important enough to receive protection may be altered from one moment to another by the State. According to Merkel, those interests obtain protection which become dominant, those which have the force to compel protection. Kohler asserts here an absolute element, culture, which is determinative for every age and every country as to what conditions in life must be protected.

Compulsion seems to be for Kohler an essential characteristic of the law. He defines law as compulsory social regulation of human relations; and adds that precisely because it is social compulsion (*Zwangsordnung*), it differs from ethics and morals with which, in the earliest historical times, it had been confused.

While it is clear that the idea of force raises a critical question which runs through modern juridical theory, it is not easy to determine what position it occupies in the system of Kohler.

With reference to criminal law, Kohler generally aligns himself with the school accustomed to call itself Classical, as against the Positivist School and the modern theories.[29]

This is especially true of his consideration of the

[29] See especially "Moderne Rechtsprobleme," p. 19 *et seq.*, and "Einführung in die Rechtswissenschaft," 2nd ed., p. 148 *et seq.*, where the notes, on which his views are chiefly based, may be found.

problem of freedom of will. Leaving behind, for the moment, his pantheistic position, and taking a place within the domain of those deists who are concerned with the relation of divine omniscience to human liberty, he regards as senseless the supposed incompatibility between them. Temporal evolution is real, although relative; and by finding God at the summit of this evolution, the past, the present, and the future, he says, fuse into an indivisible unity.

In like manner, he seeks to resolve the conflict between universal causality and human liberty; since he asserts from the same point of view, that God, in creating human liberty and will, has, on one hand, left open the diversity of possible choices which human liberty presupposes; and, on the other hand, has established alongside of these human forces of indeterminate direction, factors of another sort to secure, by preponderating over them, a final result conformable to the divine plan. Man and not God is responsible for evil. Evil arises from a plurality of phenomena, and not from the promordial essence.

The regularity of human acts established by statistics argues nothing against human liberty, according to Kohler. Even if blind chance has its laws, why should not human acts have them also, that do not proceed from mere indeterminism, but from forces influenced by motive and character.

Finally, Kohler regards human liberty as compatible with: (*a*) the law of causality, because the position of the individual being that of an autonomous agent, there is an explanation in each case of the "if" of an act, but the "why" is a thing which does not fall within the rules of causation; (*b*) with the conservation of energy, because it embraces volitional facts, whatever may be their content; and (*c*) with the physiology of

the brain, because it is not the only factor in the phenomena of sensation.

According to Kohler, liberty of will is cognized by internal experience. Whatever may be the influence of motives and character, every one feels within himself that they are not the sole forces productive of will (as was thought by Spinoza and Schopenhauer); but that an additional element intervenes — an internal resolution.

He proclaims the primacy of the will over intelligence in the sense of Saint Paul and Saint Augustine. Motives may in part influence the will; but in the last analysis the will assigns to motives their value either to enlarge or diminish their force. The will is substantive. There are men of strong will, and others of weak will. The volitional function is not the product of commingled feelings (*Gefühle*). There is an organ of the will which is something more than a container for the coordination of feelings.

In opposition to determinism, Kohler employs the arguments of the Scholastics. We are not constrained from within by the formative energies which reside in each of us. Internal motives do not convert the soul into a machine. It is necessary to distinguish *libertas a coactione* and *libertas a necessitate*. The latter signifies that, given all the conditions, one is able to do or not to do. Responsibility is based, not as is supposed by the deterministic view, on a judgment of the value of the act, but on the possibility of acting one way or another. Otherwise it would not be possible to perceive why an act should be limited to a moral valuation, and yet not include an intellectual appraisement; in which case the acts of the insane would be subject to condemnation.

Merkel denies liberty of the will, but thinks that the will may have an ethical valuation; because in ethics, as in æsthetics, it is of no consequence whether the will

may exert itself in different ways or not.[30] Kohler argues against him, holding that in æsthetics neither the actor nor the action is of consequence, but the result, the realized idea, is the important thing; while ethics deals with the subject of whom it is necessary that there be a possibility of an internal (although it may be an ineffective) deliberation. Merkel overlooks, in Kohler's judgment, the fact that character is a matter of education; that there are times when there may be an election between a variety of good acts, according to the occasion and the circumstance, or an election as to the method and form of their realization; and that, finally, such acts may be accompanied by a diversity of feelings, such as the feeling of modesty, or of vanity. We would not be able, he says, to assign to a madman who had a mania for saving shipwrecked persons any higher moral attributes than to a Saint Bernard dog.

Human will is neither subjected to the determinism of motives and character nor to the indifferent equilibrium of an absolute indeterminism. It holds a middle position between certain extreme limits, and within these limits is a thing of substance.

Kohler appears to accept the Scholastic point of view with reference to the limits between the immoral and the unjust. Law, he says, does not relate to internal motives, but to external acts although these acts are simply manifestations of the will.

What human acts fall within the province of penal law? According to Kohler, in order that an act may be punished as a delict, it is necessary that some human interest be infringed, and that the other remedies of

[30] Because, for example, we would not have esteemed the Samaritan less, even though we should not be able to imagine that he could have acted otherwise. On the contrary, we would respect him all the more if we should believe his morality to be so firm as to exclude the possibility of acting in any other way.

reaction which society employs to restrain such an act, or to make it inoperable, should be ineffective. The interests which the penal law has to protect vary according to the age, and according to social conditions.

In all cases, however, punishment is the ultimate remedy applicable solely on account of the impotence of other remedies, and especially by reason of lack of competence of the civil law.

The theory which supposes that in all cases there is a prohibitive standard against certain kinds of acts, and a threat of punishment for the offender, is not admissible according to Kohler, except in the domain of police regulations; where, for example, it may be required that a coach shall not turn to the right, or to the left. Violation of such a regulation does not touch any social interest. Such regulations are purely arbitrary, and established for the maintenance of social order.

The purpose of penal law, according to Kohler, is retribution, which re-establishes, by means of the infliction of suffering, the order which has been disturbed. If the standpoint of retribution is departed from, penal law is transformed into a system of police tutelage, or a kind of utilitarian security, or into a pedagogical organization. Such departures have nothing to do with justice.

Kohler therefore arrives at an absolute theory, but he attenuates this absolutism in various ways:

1. The intensity of retributive punishment is modified according to the postulates of the culture of the age;

2. Although not a part of the retributive theory, two other conceptions are found in connection with it: intimidation and correction, both of which must accompany punishment;

3. Because he accepts the exigent cultural methods common to nearly all schools of thought, and requires of the State that it shall further those conditions which favor a sane and noble social life, contributing to the prevention of criminality. These conditions are: education in all its phases, especially the training of character; the cultivation of religion because of its great moral influence; encouragement of the associational impulse (*esprit de corps*); efforts against alcoholism; making it easy to obtain work; measures of preventive security (including deprivation of liberty) against those delinquents who after full punishment are not reformed or who are incorrigible; tutelage over convicts after sentence; constitutional liberty, etc.

While it is beyond doubt that all these functions, and many others with reference to the delinquent, attach to the State, and that, according to Kohler, these protective activities of the State are separate from the proper scope of penal law, yet his absolute theory is diminished and enlarged by the fundamental notions of the relative theories.

Kohler holds that the cultivation of spiritual interests and the progress of civilization do not diminish criminality. He insists, on the contrary, that the seeds of progress hold the elements of corruption, which we should make an effort to eradicate. Therefore, the greater the degree of culture, the more severe should be the penal law.

Kohler does not, however, regard this increase of criminality as an obstruction to the advance of civilization. Since the time of Nietzsche, he says, it has not been possible to question that it is not the moral worth of a man, but his influence in the development of culture and of humanity that is of importance in history. It seems, therefore, that Kohler agrees with

those who, like Durkheim, look upon delictual acts as necessary phenomena, even if evil ones.

Kohler is today perhaps the most conspicuous representative of a tendency of juridical science which has taken form in the most recent times. This new science has already established a large part of its discoveries, and seeks to give them a position as fundamental problems. I refer to the so-called science of comparative law, which is also called ethnological jurisprudence, or juridical ethnology.

The reaction against the abstract impulse of Natural Law, represented by the Historical School, turned the point of view to empirical facts as a secure unified basis of scientific construction. In order to understand the law as the conscience of the people it was necessary to search into the juridical life of successive generations, into the continuity of this life which gave it its character. Resort was had to what lay close at hand. The adherents of the Historical School, notwithstanding that here and there a voice was raised which proclaimed the necessity of looking to the whole legislation of ancient and modern peoples (Thibaut), did not found their doctrines upon fundamentals, or extend their studies beyond the Roman law or the German law. The Historical School was principally a school of jurists preoccupied not with an investigation of *the* law but *their* law.

The introduction of universal history is due principally to the influence of abstract or speculative philosophy, to Hegel and the Hegelians. It was one thing to assign to history its place as a concept of the world; it was another to discover and bring to light its secrets. The latter object has been attained as the result of much investigation. When Gans planned his great work, the materials were not yet in existence for a solidified construction of his labors.

The idea of gathering up these materials as an universal history of the law took form after the middle of the last century.

Bachofen, Maine, MacLennan, Morgan, Post, Howitt, Bernhöft, Dargun, Leist, Letourneau, Lubbock, Westermarck, and many others made important contributions to the result; and the Journal of Comparative Law in Germany (*Zeitschrift für vergleichende Rechtswissenschaft*) became the principal repository where the new discoveries were set forth.

These investigators were not content simply to gather up data, a great deal of which was to be had from travelers and missionaries, or to be excerpted from literatures, but they labored to co-ordinate the facts of history and to reconstruct from isolated particulars, legal institutions.

This new science had hardly begun to attain expression in an extension of its scope, when it received the impact of the realism and positivism of the time, and broke its moorings to navigate on its own account.

Post is perhaps the most eminent representative of that aspect of the science of comparative law which takes on a constructive function and raises itself up against the philosophical conception which generated it, and the historical influence which nourished it, in an aspiration to be the foundation of all juridical science.

Post rejects conscience as the legal standard and declares that experience is the sole basis of knowledge. In order to fortify experience he has recourse to the investigation of the legal institutions of all peoples. These institutions in their comparative scope are not of interest for local legislation and have no connection with the conditions of the moment, except as elements for the elucidation of certain phases or developments of legal institutions (such, for example, as hereditary

position, the territorial, feudal, and corporate notions) which find universal repetition in life and argue for uniformity of evolution and the fundamental unity of human nature.

This basic unity of human nature is one of the axes of this doctrine, since, being founded on this unity, it aspires to the universality of experience which is found in the facts of history. Especially is this true of primitive ages, where there are large blanks which history cannot fill in. These vacancies could not be understood otherwise than by virtue of the hypothesis which assumes the stages of savagery, barbarism, semi-civilization, and culture, as the phases of human evolution.

Ethnological jurisprudence thus comes into conflict with abstract philosophy of law and historical jurisprudence; and therefore the doctrine of Post has had to bear the assaults of both camps.

From the philosophical side it is urged, for example, by Schuppe, who denies that there is any universal value in the method of comparative law, that in the investigation of a thing, it is necessary to have some antecedent notion, however vague, of what this thing is. There is no experience without a general notion of the object of experience. Experience is not able to seek juridical phenomena, nor is it able to apply a juridical judgment to any fact without the aid of a more or less definite understanding of what law is, which is a notion like all other general concepts which are given to us by language originally in an obscure form. Although concepts do not arise except by comparison, yet comparison is not the only agency which gives them form. Neither is it necessary to know the history of all peoples to understand the nature of law, any more than it is necessary for the zoölogist or the botanist to study all the examples of a species in order to arrive at a scientific

induction. Although the common element must be found in the whole species and in each individual specimen, yet it does not fall to say, that the common element is discovered by a mere elimination of differences. Such discovery rather depends on the individual aptitude of the investigator. One observer with a small number of specimens may arrive at a scientific generalization which another observer is not able to perceive in his examination of a large number of examples.

On the historical side, some writers doubt the advantage of specialization by the comparative method over the critical and the historical method; others (as for example, Schröder) would confine the history of the law to the Aryan peoples, and leave ethnology to deal with the others; and again others, like Leist, reject the investigation of juridical schemes of rational affinities among peoples (which Leist thinks is the scope of comparative law), and separate for study the institutions of a group of people (like the Aryan group), applying the critical historical method of investigation.

Post's theory is not the only one in the science of comparative law. At any rate, there are other notions which are presented under the same name which agree in admitting validity to the comparative method, but do not agree as to the result of this method, or as to the nature of the comparison to be employed.

Chiefly, there is a large group of jurists who cultivate a parallel and yet comparative study of modern laws as accessory and auxiliary to the knowledge of domestic law, for the purpose of arriving at the dominant ideas of the age, in a common legislative program, or as the basis of a civil polity.

Kohler without question inclines to the viewpoint of Post and, like him, carries his comparative legal investigation by preference back to the institutions of

remote ages, and to primitive and semi-civilized peoples. The law of the nigritic Australians, the Papuans, the Polynesians and the Malays, of numerous African and American tribes, of the Aztecs, Chinese, Japanese, Egyptians, Hebrews, Assyrians, and Babylonians, the Burman and the Buddhist law, the law of the Mussulman, East Indian, Armenian, Greek, and the Celt, the Thibetan law and many others have been the object of his labors. At one time, he has sought to reconstruct their point of contact; at another time, he has investigated some special legal manifestation; and again, his studies have had reference to some definite institution, such as the community of wives (*Weibergemeinschaft*), artificial relationship (*künstliche Verwandschaft*), marriage, matriarchy, kin-revenge (*Blutrache*), the law of asylum, or the ordeal.

Sometimes Kohler regards the science of comparative law as a kind of prehistorical instrument, which, by a method of its own, leads us up through the uncertainties of the past to the reach of German historical knowledge.[31]

Like Post, Kohler reduces the various juridical systems which appear in remote ages, or in distant places to certain types in which he distinguishes, in the midst of an infinite variety of customs and standards, certain common phases of a general evolution.

The fundamental unity of mankind, to which reference was made above, is necessarily the basis of this method. This is demonstrated in Kohler's judgment by the identity of certain customs which obtain among peoples widely separated and in different ages. The inferior stages of cultural progression are uniform in

[31] See his article, "Die Entwicklung im Recht," in Grünhut's "Zeitschrift für das Privat- und öffentliche Recht der Gegenwart," XIV (1887), p. 410 *et seq.*

their general outlines. Differences appear among peoples as in the case of individuals with certain somatic developments. For this reason, Kohler rejects many constructions derived from comparative law, such as those of Leist, who would derive from the identity or similarity of certain legal institutions among various peoples, the prevailing legal spirit among them in the age in which the institutions appeared.

Kohler does not content himself with a composition between philosophy of law and universal history. He would penetrate them intimately. History furnishes the facts and phases of legal evolution, its cultural antecedents, its consequences, the total mechanism of the forces and obstructive elements which have determined the scope of life, and out of which the law has come as one of their products. At this point, philosophy gathers up these materials, and investigates which of them have been, and which will be, of value in the juridical order, and in the teleological evolution of the universal process.

Neither for Kohler nor for Post can there be any philosophy of law without universal history. And if a man like Hegel was able in a certain measure to construct such a philosophy, it was due to the fact that he had divined with the intuition of genius the positive element which his own age had failed to recognize.

The agreement between Post and Kohler does not, however, extend further. While Post starts with a kind of mechanical pantheism and places the general evolution of law at the base of his pilosophy, Kohler founds his system on the Hegelian doctrine (with the departures before indicated), and therefore joins with the historical element another, an *à priori* factor, the relation between which is not methodological as with Post, but metaphysical as with Hegel. According to

Hegel, history is a dialectic unfoldment which proceeds in consequence of the internal forces which impel it by an ever present power; and which philosophy constructs *sub specie æternitatis* in the form of a concept.

Finally, the underlying factor of history is likewise different in Post and Kohler. Post bases it on the ethnic element, and Kohler relies on the cultural relation. Bachofen had already given culture a determinate position in the law; but, according to Kohler, culture is not of itself the sum of spiritual forces which at any time are operative in evolution. There is a law of life, an immanent finality which indefectibly impels, in various ways, mankind to its highest destiny.

[Touching the latest and most discussed interpretation of idealism, see *Kohler*, "Bergson und die Rechtsphilosophie," in "Archiv f. R. u. W. Phil.," Band vii, Heft i (October, 1913), pp. 56–69. Kohler finds nothing essentially original in the "new Spinoza," especially in his thoughts on evolution, stating that all this has long been taught in the school of Hegel. Kohler discovers, however, in Bergson's treatment of intuition a new life for the metaphysics of history of great importance for the jurist, as is shown, as he thinks, peculiarly in the jurisprudence of Rome and England.—*Editor*.]

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